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V. A. Griffith

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THE NEW MISSISSIPPI CIVIL PRACTICE ACT— ITS BACKGROUND AND EFFECT

*V. A. Griffith**

When the courts were first regularly established in this country, they took as their rules for pleadings in common law cases those that had prevailed in, and as they existed at or about the time of the separation from, the parent country, that is to say, the rules of common law pleading.

The rules of common law pleading which required strictly that a particular cause of action could be sustained only by adherence to its appropriate form of action, and that there should be no departure whatever in the subsequent pleadings, had rendered a service of inestimable value in shaping the substantive common law into definite and clear cut principles, and they rendered the same service in the formative period of our own country.

But when the latter period had about come to an end in the firm establishment of the general principles of the common law in the new states, it was seen that the extremely technical requirements of the common law system of pleading with all its dialectical niceties and its facilities for frustration and delay were such as to render it a hindrance in the prompt and proper attainment of real justice in an intensely active modern world, so that about the middle of the nineteenth century statutory reforms were being made in nearly all the states, and in 1848 New York led out in the adoption of a code of practice by which all forms of action and all purely technical pleadings were abolished, and a simple system patterned largely upon the rules in equity and in admiralty was substituted for the common law rules of pleading. This was followed in other states until now in a majority of them the code practice prevails, and there has been added a similar practice in the federal courts throughout the nation by the Federal Rules of Civil Procedure adopted in 1938, and amended in minor particulars in 1947.

Common Law Pleading Prior to 1850

When Mississippi became a state its first code, commonly known as Poindexter's Code, in effect June 22, 1822, made no changes in the common law rules of pleading of any general importance, except that a defend-

*Chief Justice, Supreme Court of Mississippi. The ideas expressed in this article are the personal views of the writer and do not necessarily reflect the opinion of the Court.

ant was allowed to plead "as many several matters as he may judge necessary to his defense;"[1] provision for amendments was made; and a statute of jeofails was included similar in its terms to our present statute.[2] These were about all down to and including Hutchinson's Code of 1848.[3]

What happened in our circuit courts in the more important portion of the early period referred to, say from 1835 to 1850, is told by a veracious witness whom we may put on the stand. Joseph G. Baldwin, one of the great lawyers of those days and who practiced in several of the eastern counties of the state wrote, during his residence there, a series of scintillating sketches published from time to time in the *Southern Literary Messenger* and which he later gathered into a volume called *Flush Times of Alabama and Mississippi.* Baldwin during the fifties went to California and became a member of the supreme court of that state. His opinions appear in Volumes 10 to 19 of the California Reports.

In his sketch entitled "The Bench and the Bar," he speaks first of the difficulties in the circuit court practice encountered by him and the other younger members of the bar. He says:

> We learned before long how every sort of possible case could be successfully lost; there was no way of getting out of court that we had not tested. The last way we learned was via a verdict: it was a considerable triumph to get to the jury, though it seemed a sufficiently easy matter to get away from one again. But the perils of the road from the writ to an issue or issues—for there were generally several of them—were great indeed. The way was infested with all imaginable points of practice quirks and quibbles. . . . We had to run a gauntlet of technicalities and quibbles to get a judgment on a plain note of hand.

Turning then to speak of the experienced members of the bar who had become leaders he said:

> The leaders were sharp fellows—keen as briars—au fait to all trap points—quick to discern small errors—perfect in forms and ceremonies— . . . the idea that justice had anything to do with trying cases . . . never seemed to occur to them once as a possible conception.

He paid a special tribute to one of the leaders whom he called "Jim T", and who, as we know, was James T. Harrison of the Columbus bar. Of him Baldwin said:

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[1] *Cf.* 4 Anne, c. 16.
[2] MISS. CODE ANN, § 1544 (1942).
[3] *See* HUTCHINSON'S CODE, c. 59 (1848).

> He had accomplished himself in the elegant science of special pleading—had learned all the arts of confusing a case by all manner of pleas and motions, and took as much interest in enveloping a plain suit in all the cobwebs of technical defense as Vidocq ever took in laying snare for a rogue. He could 'entangle justice in such a web of law' that the blind hussey could have never found her way out again if Theseus had been there to give her the clew. His thought by day and his meditation by night was special pleas. . . . He could draw a volume of pleas a night, each one so nearly presenting a regular defense, that there was scarcely any telling whether it hit or not. If we replied, ten to one he demurred to the replication, and would assign fifteen special causes of demurrer in as many minutes. If we took issue, we ran imminent risk of either being caught up on the facts, or of having the judgment set aside as rendered on an immaterial issue. It was always dangerous to demur, for the demurrer being overruled, the defendant was entitled to judgment final . . . How many cases where, on a full presentment of the legal merits of them, there was no pretense of a defense, he gained it is impossible to tell. But if the ghosts of the murdered victims could now arise Macbeth would have an easy time of it compared with Jim T.

And he summarized his tribute to Jim T. by the statement that in those days in the old log courthouses he threw "the boys right and left, as fast as they came to him, by pleas dilatory, sham and meritorious, demurrers, motions and variances. So infallible was his skill in these infernal arts that it was almost a tempting of Providence not to employ him."

The Reforms of 1850

Such is the vivid picture of what was being done to the justice of cases on their merits under the technical rules of common law pleading—the picture that the Legislature had before it when it convened in regular session in 1850—together with the knowledge of the reformation made in New York two years before, followed by Missouri in 1849. The governor in his message of January 7, 1850 said in part: "The administration of justice in our circuit courts is, in my opinion, greatly impeded and rendered litigious and burdensome by adhering to the common law forms of actions, pleading and practice." He declared that a large portion of the litigation brought to the High Court "has arisen upon technical points of law growing out of the deficient forms of actions and the pleadings applicable thereto, without any reference to the real merits of the controversy between the parties." He recommended that all existing forms of action in civil suits in the circuit courts be abolished and that defenses be required

to be presented by answer as in the chancery court. The response was the passage of Chapter 4 of the Laws of 1850, which was approved March 9, 1850.

The Act abolished all the forms of pleading under the common law, substituted a complaint as the initial pleading on the part of the plaintiff, and enacted that the complaint "shall contain a statement of the facts, constituting the cause of action in ordinary and concise language, without repetition and in such manner as to enable a person of common understanding to know what was intended." It provided that "the only pleading on the part of the defendant shall be either a demurrer or an answer," and it prescribed that the answer in addition to its denials shall contain "a statement of any new matter constituting a defense in ordinary and concise language without repetition and in such manner as to enable a person of common understanding to know what is intended." And it allowed the defendant to "set forth by answer as many defenses as he shall have," and prescribed how the separate defenses shall be separately stated.

It provided that "when the answer shall contain new matter, the plaintiff may reply to it," and that, in addition to his denials of any of the new matter, "he may allege in ordinary and concise language, without repetition and in such manner as to enable a person of common understanding to know what is intended, any new matter not inconsistent with the complaint in avoidance of the answer or of any defense set up therein."

To make sure that it intended to sterilize all dialectical niceties and mere technicalities in the former rules of common law pleading, and in addition to the repetition that a pleading shall, as to matters of form, be sufficient if stated "in such a manner as to enable a person of common understanding to know what is intended," it expressly provided "that in the construction of a pleading, for the purpose of determining its effect, its allegations shall be liberally construed with a view to substantial justice between the parties," and that when a pleading is "so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite by amendment," and "that no variance between allegation and proof shall be deemed material unless it have actually misled the adverse party to his prejudice in maintaining his action or defense on the merits."

The effect of the Act of 1850 upon the older members of the bar, such as was Jim T., was well nigh apoplectic. They did not want the intricate tools, which they had learned so expertly to use and with such devastating results upon their less fortunate opponents, to be taken away from them. Moreover, what may be broadly designated as the physical conditions in the state were not such as to promote at that time a sympathetic reception

of this sensible modern legislation. In many counties the old log court houses, or what was but little better, were still in use, and accommodations for those in attendance were often of a limited and primitive character. The members of the bar resided, in the main, in the larger county-seat towns and rode circuit to the adjoining or remote counties. They met their clients and were employed when the courts convened, and they had no time to file answers, drawn out in long hand at the return term, that is to say at the term then in session. They preferred instead a practice under which they could file in a few words a simple plea of the general issue with leave to file special pleas when they had time to do so on return to their offices—the return term to be an imparlance term.[4]

The Recession of 1857

There was need at the time for a revised code of all the laws of the State. On March 1, 1854, there was approved an act for the appointment of a Code Commission.[5] By Section 4 of that Act it was expressly provided: "That said commissioners shall also prepare a Code simplifying and regulating the practice in the courts of the State."

On this Commission there were appointed three lawyers of the old school; they were of the leaders of whom Baldwin spoke and had been brought up under the common law system. Nevertheless, they endeavored faithfully to comply with their commission to "simplify the practice in the courts of the State." And although they laid aside the answer feature of the Act of 1850, and reverted to the shorter forms of defensive pleadings, they did preserve much of the spirit of the Act and in effect some of its details. Their work was adopted as the Code of 1857, effective on November first of that year.

As to the initial pleading, the declaration, the Code of 1857, by Article 78, Chapter 61, stated as follows: "The declaration shall contain a statement of the facts constituting the cause of action in ordinary and concise language, without repetition, and if it contain sufficient matter of substance for the court to proceed on the merits it shall be sufficient." This in brief was what was contained in the Act of 1850 and has been carried down through all subsequent Codes, and is now Section 1464 of the Code of 1942.

It was as to the pleadings subsequent to the declaration, and other than the general demurrer, that the Code of 1857 departed from the Act

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[4]See address of Hon. Stokes V. Robertson, Sr., President of the Mississippi State Bar, delivered at its annual session on May 28, 1948, and published in 19 Miss. L. J. 381.

[5]Miss. Laws 1854, c. 4.

of 1850. In deference to the circuit riders and to the general conditions then existing there was substituted, as already stated, the shorter forms of defensive pleadings throughout, and as an ultimate in the effort at simplicity, the Code of 1857, by Article 97, Chapter 61, carried this broad provision, which is now Section 1480 of the Code of 1942:

> Notice of special matter under general issue. If the defendant desire to prove under the general issue in an action any affirmative matter in avoidance, which by law may be proved under such plea, he shall give notice thereof in writing, annexed to or filed with the plea, otherwise such matter shall not be allowed to be proved at the trial; and the defendant may, in all cases, plead the general issue and give written notice therewith of any special matter which he intends to give in evidence in bar of the action, and which he would be otherwise obliged to plead specially; and when such notice shall be given by the defendant, the plaintiff shall, before the trial of the cause, file a written notice to the defendant of any special matter which he intends to give in evidence in denial or avoidance of such special matter so given notice of by the defendant, and to which it would have been necessary to reply specially had the defendant's defense been specially pleaded; and if notice be not given as required, evidence of such matters shall not be admissable on the trial.

But, as stated, the Code of 1857 was not content to depend solely upon the quoted section as to the pleadings subsequent to the declaration and other than the demurrer, but allowed an optional, alternate course by which the defendant could plead specially, somewhat as at the common law, but in the provisions calculated to prevent the parties from being thrown out of court on technical grounds, there still remained under this optional course nearly all of the machinery by which the parties could be unduly held or delayed in court before a trial on the actual merits. That the merits would or could be ultimately reached was assured, but when was very much less certain.

The Rules of Common Law Pleading in Mississippi

We have seen in brief what were the provisions of the Act of 1850 as to defensive pleadings. In order to understand better what was done by the Code of 1857 in taking the course it did, it is appropriate to recur, at least in brief outline or by a thumbnail sketch, to the rules of the common law as respects the defensive pleadings. Such a brief review will be all that will be necessary to a complete understanding of the new practice act, which is House Bill 530 of the Laws of 1948, for always in the examination of any present system it is an advantage to look back upon the rudiments, at least.

of that from which it sprang. Even in a matter like this we can never entirely escape the hands of history. It is appropriate to note here also that the provisions of the Code of 1857, as to pleadings in the courts of law, have survived in all substantial respects throughout the ninety years from 1857 to 1948, and still survive except as now changed by the new Act.

But before proceeding to a sketch such as above indicated we should note some general provisions of the Code of 1857 which have survived in all our subsequent Codes. And first of these in importance is Article 93, Chapter 61, which is now Section 1475 of the Code of 1942, as follows:

> All the provisions heretofore contained in reference to the form and sufficiency of the declaration shall extend and apply to the pleas of the defendant and to all subsequent pleadings in the cause, so far as same may be applicable.

Article 117, Chapter 61, which is now Section 1498 of the Code of 1942, brought forward the provision in the Act of 1850 that:

> When the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, or if any pleading shall be so framed as to prejudice, embarrass, or delay the fair trial of the action, the court on application of the opposite party, shall cause the same to be made definite and certain, or may strike out or amend the same.

Note, too, Article 119, Chapter 61, which is now Section 1500 of the Code of 1942, dispensing with immaterial verbiage, and Article 116, Chapter 61, which is now Section 1497 of the Code of 1942, that "no pleading shall be deemed insufficient for any defect which could heretofore be objected to only by special demurrer." Article 180, Chapter 61, which is now Section 1511 of the Code of 1942, granted full power to allow amendments to pleadings and Article 182, Chapter 61, which is now Section 1512 of the Code of 1942, brought forward the provision of the Act of 1850, that a variance between allegation and proof shall be deemed immaterial unless it shall have actually misled the adverse party to his prejudice.

The foregoing general provisions swept away all or about all the technical niceties and verbality of common law pleadings and substituted substance instead of form. There were other provisions to the same general effect, but more particular in application, which will be noted in footnotes to the sketch now to be undertaken. It will begin with pleas subsequent to the demurrer.

Brushing up on the rules of common law defensive pleadings, we will remember as follows:

If the defendant elected to defend at all, and did not demur to the declaration, he had to plead thereto. A plea avers the existence or non-existence of pertinent and material facts and pleas are (1) dilatory or (2) in bar.

A dilatory plea is one which goes not to the merits but presents some matter of fact which if true will postpone or avoid a trial on the merits for the time being. These are (a) to the jurisdiction of the court; (b) in suspension of the action; and (c) in abatement of the action. They must be presented, if presented at all, first before the defendant has demurred or plead to the merits.[6]

When the court has no jurisdiction over the subject matter, the objection thereto may be taken at any time and in any manner, but if the case is such that the court might under some circumstances have jurisdiction of it, then the fact or facts which show the want of jurisdiction must be pleaded with certainty and with a negative of every fact from which a presumption of jurisdiction might arise, and must be pleaded first before any other step whatever is taken by the defendant.

A plea in suspension is one which alleges some fact as a ground for not proceeding with the pleadings on the merits at the present time, and a plea in abatement is one which alleges some fact or ground for the dismissal of the present action, but not on it merits, as for instance when in an action of debt the defendant pleads in abatement that the due date of the debt had not arrived when the action was begun.

Whether the new Act by its use in its first section of the term "plea in abatement" intended to include all dilatory pleas as matter privileged to be included in the answer is debatable, but, because of the subsequent language that such plea matter if to be separately heard must go to "the entire present cause of action," it is suggested that a preferable conclusion is that the term "plea in abatement" was used in its usual sense, and that other dilatory matter is to be raised by motion and not in the answer—this under the rule that when a procedural point is available to any party and there is no regular pleading by which he may present it, he may do so by motion. And there will be appropriate cases even in strict abatement wherein a motion may be allowed to raise the issue.[7]

At common law dilatory defenses may be interposed by demurrer, when, but only when, the ground therefor plainly appears on the face of the

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[6]By MISS. CODE, Art. 94, c. 61 (1857) and MISS. CODE ANN. § 1476 (1942), it is provided that a plea in abatement as to matter which does not appear of record must be verified by oath or affirmation.

[7]*See* Strickland v. Humble Oil Co., 194 Miss. 202, 203, 11 So.2d 820, 822 (1943).

declaration,[8] but as already mentioned dilatory defenses whether by plea or by demurrer or by motion must be presented before any steps are taken by the defendant on the merits, and this includes a defense by general demurrer. By statute in many states two or more dilatory pleas may be filed at the same time to the same action.[9]

At common law, when a general demurrer to a declaration was overruled, the plaintiff was entitled to judgment on his declaration, and if the demurrer was sustained, the action would be thereupon dismissed on the merits. Under the modern practice, or by rules or statutes, when a demurrer is sustained the plaintiff is allowed, on his application therefor and for good cause shown, to amend his declaration, and when the demurrer has been overruled, the defendant is allowed to plead to the merits within the time allowed by the court to do so.[10]

If the defendant does not present, or succeed in, a dilatory plea, or if he does not demur, or his demurrer has been overruled, he must plead to the merits, that is to say, he must plead in bar, and his plea must be (1) a denial, called a traverse, of the averments of the declaration, or (2) a plea in confession and avoidance. He may deny all the allegations of the declaration by what is called the general traverse, but more commonly called the plea of the general issue, or he may deny some particular averment in the declaration, which particular averment if omitted from the declaration or disproved would cause the action to fail, in which latter case the plea is called a common traverse. There was another traverse at the common law called the special traverse, which was a denial preceded by introductory affirmative matter explanatory of the denial. This particular form of pleading was capable of such highly technical use that statutes were enacted either abolishing it, or declaring it unnecessary.[11] And the common traverse produced so many questions of its sufficiency to meet the dominant issue that its use was to a considerable extent abandoned in favor of the more convenient and effective plea of the general issue, which, as stated, simply denies in general terms all the averments of the declaration.

By the new Act the common law traverse is no longer with us, and all that is now necessary to know about it is to know how to avoid it. Now we must answer and thereby must respond to each material allegation of

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[8] *See* MISS. CODE ANN. § 1497 (1942).
[9] MISS. CODE, Art. 94, c. 61 (1857); MISS. CODE ANN. § 1476 (1942).
[10] MISS. CODE, Art. 109-110, c. 61 (1857); MISS. CODE ANN. § 1491-1492 (1942).
[11] By MISS. CODE, Art. 114, c. 61 (1857) and MISS. CODE ANN. § 1495 (1942), it is provided that "special traverse shall not be necessary in any pleading."

10 Miss L J 186

the declaration, not in any general or broadly inclusive terms, but as if each such allegation were a separate interrogatory put to the pleader.[12]

A plea of confession and avoidance is one which admits or impliedly admits the allegations of the declaration but avers further and additional facts which constitute an answer or defense to the declaration and thereby avoids its averments. And every substantive fact essential to such a defense must be averred—a rule which applies to new or affirmative matter pleaded in any subsequent pleading. No pleading of that character may be aided by any inference which is not a necessary inference.

Under the strict rules of the common law, a plea could not be made in confession and avoidance unless it expressly or impliedly conceded the truth of the allegations of the declaration and the plaintiff's right therein alleged. So conceding, it was the office of the plea of confession and avoidance to allege affirmative facts which would show such an excuse or justification for the conduct charged against the defendant as would avoid liability, or else would show some such affirmative facts as would release the defendant from liability. It could not deny the plaintiff's case as stated in his declaration and at the same time seek to avoid it. This concession as a condition to the plea of confession and avoidance was called color; that is to say, it gave color, express or implied, to plaintiff's case as stated by him, and provided that there was to be no denial of it as an original matter but that the liability was subsequently avoided or discharged. This narrowed the use of the plea of confession and avoidance and led to the enactment of statutes that color shall not be necessary in any pleading.[13]

When the plea of the defendant is in confession and avoidance, the plaintiff must reply to it by a plea called the replication, by which the plaintiff may deny in general terms the affirmative matter set up in the plea, one form of such a replication being called the replication *de injuria*, and having so denied he will conclude his replication with the phrase "and this he prays may be inquired of by the country." Or plaintiff may set up affirmative matter in avoidance of the affirmative matter pleaded by the defendant, to which the defendant may thereupon file a pleading called the rejoinder, whereby he may deny the affirmative matter set up in the replication, or he may plead affirmative matter in avoidance thereof, in which latter case the plaintiff must plead in response his surrejoinder, to which the defendant may reply with a rebutter, to which the plaintiff may respond

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[12]"The defendant shall answer fully all the allegations of the declaration without being specially interrogated. All matters of fact averred in the declaration and not denied by the answer otherwise than by the general traverse, may be taken at the hearing as admitted." Advance Sheet 6, General Acts of Miss. 1948, H.B. No. 530, § 2.

[13]By Miss. Code, Art. 114, c. 61 (1857) and Miss. Code Ann. § 1495 (1942), it is provided that "express color shall not be necessary in any pleading."

with a surrebutter. At each step the party plaintiff or defendant could demur to the next preceding pleading of his opponent. In each of the foregoing steps, when a pleading sets up affirmative matter in avoidance of the next preceding pleading, it impliedly admits the facts averred in the said next preceding pleading.

At any stage of the foregoing series of pleadings after the defendant's plea, the opposite party could have ended the series by no more than a denial of the affirmative matter in the next preceding pleading and with a conclusion, if brought to a close by the plaintiff, "And this plaintiff prays may be inquired of by the country," and if ended by the defendant, the recital will be, "And of this he puts himself upon the country."

In the early days of the common law, when issues of fact came regularly to be tried by jurors as impartial arbiters, instead of being witnesses in the case as they originally were, it was the object of pleadings not only to reduce the disputations of fact between the parties to a single ultimate issue, but also that the submitted issue should be the product of a single set of facts strictly germane to that issue. Hence neither the plaintiff nor the defendant was permitted to present in his pleadings more than one matter constituting a sufficient ground of action or defense, and, if more than one was attempted to be stated, it would make the pleading duplicitous and subject to a special demurrer, not counting allegations which were entirely immaterial and superfluous.

As a consequence of this rule, only one plea in confession and avoidance could be taken in a given case. Subsequently it was allowed to the defendant to plead, by leave of the court, as many separate pleas as he had, that is to say, separate and distinct defenses to the same alleged cause of action, so long as the separate defenses were separately pleaded. By statute or rules in most states that may now be done without leave of the court. Some statutes or rules of court are so broad as to allow the following matters to be pleaded by the defendant at the same time: payment, accord and satisfaction, release, set-off, tender in whole or in part, leave or license, duress, estoppel, statute of limitations, and others as enumerated in the particular statute, and some of the statutes or rules allow these to be pleaded along with the plea of the general issue,[14] but it will be observed that dilatory pleas are not allowed along with pleas in bar when there is only a single cause of action stated in the declaration.[15] If the defendant successfully maintains any one of the matters in bar separately pleaded by him, he will be entitled to judgment, although he may fail as to the others.

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[14]Miss. Code, Art. 95, c. 61 (1857); Miss. Code Ann. § 1477 (1942).

[15]Rice v. Patterson, 92 Miss. 666, 668, 46 So. 255 (1908). *See* Miss. Code Ann. § 1478 (1942), which is the concluding clause of Miss. Code, Art. 95 c. 61 (1857).

When several such separate pleas are separately pleaded, as they must be, the pleadings subsequent thereto are confined to each separate matter as if the separate matter so separately pleaded were the only plea in the case. The subsequent pleadings may not bring within their allegations any matter not directly in line or in point with the particular separate plea. The separate pleas are not to be confused in any subsequent pleading: a party is not permitted to depart from or desert the ground taken in his last pleading and resort to another distinct therefrom or not so close to it as to serve to fortify it. This is still the rule and is not modified by the statutory changes to which references have been made.

The rule that there may be several separate pleas to the same alleged cause of action does not permit, as has already been indicated, that there may be several replications to the same plea, with the replication setting up several different answers to the matter alleged in the plea, nor may this be done in a rejoinder or in any of the subsequent pleadings to the end of the series. The injustice which may be worked under a strict application of this rule has led to its reasonable modification in many jurisdictions, even where the modern code practice does not prevail, but these modifications do not admit departures, as has already been mentioned.[16] The pertinency of the foregoing outlines of the pleadings subsequent to the plea of the general issue will become more apparent when we reach the discussion of Section 4 of the new Act.

When a plaintiff has two or more causes of action against the same defendant, of the same nature or character or so nearly so that they could be conveniently and easily tried together without too much danger in the confusing of issues, he is allowed to present all of them in the same action. He must do so, however, by a declaration drawn into separate and distinct counts, each count to state completely and distinctly the particular cause of action with which it deals, and in all respects as if it were the only cause of action presented by the declaration, with no one count receiving aid from another count, except that matter embraced in one count may be imported into another by reference to avoid repetition. If however they are of such a different character that the same judgment cannot be rendered covering each of them, they cannot be joined, nor as a rule may a count in contract be joined with one in tort.

And where the same cause of action may be stated by way of a different allegation of the facts, so long as the facts, thus differently grouped, make out in the end the same cause of action, the different statements may be set out in separate and distinct counts, each group complete in itself as

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[16]Miss. Code, Art. 105, c. 61 (1857); Miss. Code Ann. § 1486 (1942).

has been noted in the foregoing paragraph. This is because the plaintiff may not be certain as to what group he can prove on the trial, and he will not be under the necessity to amend when the witnesses have been called and the testimony heard, and because thereby he will avoid a special demurrer for duplicity.

The defendant may plead or demur to each count in a declaration to the same extent and as fully as if that count had been all that was contained in the declaration, and also of pleadings subsequent to the plea. And whether the declaration is in a single count or in more than one, each defendant may plead separately unless all have the same defense or defenses.[17] Under the new Act the defendant must answer to each count as at common law he had to plead thereto.

When for any wrong whether for breach of contract or in tort the plaintiff has suffered more than one item of damage, he must sue for all of them in the same action, and if proper to lay the damages in more than one count he must do so. This is called the rule against splitting causes of action.

The following general rules are applicable to the pleadings in all superior courts, whether under common law pleading or in equity, or under codes of procedure—applicable therefore to the new Act so far as its terms permit.

(a) A clear and distinct statement of the facts essential to constitute the cause of action or ground of defense must be made in all pleadings in such terms that the court, the adverse party, and the jury may understand it; but less certainty or particularity is required when the facts lie largely within the knowledge of the opposite party.

(b) The essential averments of a pleading must be positive in form and not by way of recital. They must be alleged in such form that they may be directly denied. For example, it is not sufficient to allege that the pleader has been informed or believes, and the facts must not be so averred that their meaning must be worked out through the process of argument.

(c) A pleading must not be ambiguous in its terms, or cast in such language that the court and the opposite party will not know what is definitely meant thereby, and this includes an averment which although affirmative in form leaves the implication of a negative in part, or when negative in form there is therein an implication of an affirmative or an affirmative in part.

[17] *See* MISS. CODE ANN. § 1513 (1942), which is MISS. CODE, Art. 183, c. 61 (1857).

(d) Except when otherwise expressly allowed by statute, pleadings must not be inconsistent or repugnant, or in the alternative so that it cannot be told upon which of the inconsistent or repugnant or alternative statements the pleader intends to rely.

(e) Matters merely of evidence should not be stated, but only the ultimate essential facts, in as simple language as is available. If the facts are complicated and on account thereof it is necessary to avoid great prolixity, a brief and concise allegation will be sufficient.

(f) It is not required that allegation be made of what is necessarily implied or what the law will presume, from the other facts well and expressly pleaded.

(g) It is not necessary to anticipate and deny in advance a position which the pleader may suppose his opponent may take.

(h) Every pleading must answer the whole of what is materially alleged by the adversary pleading, and that which is not denied is admitted, except, of course, as to dilatory pleas and pleas in estoppel.

(i) There should not be set up among the allegations in any pleading anything more than is necessary to sustain plaintiff's action or the defendant's defense, and when more is so alleged it is treated as surplusage and may be stricken on motion. The failure of the party to prove the surplusage will not of itself defeat him if nevertheless he has proved enough under his essential allegations. If, however, a party instead of standing on what the law would presume from facts already alleged proceeds further and expressly alleges the presumed facts, he must prove the facts which otherwise would have been presumed, for he has abandoned the presumption and thereby has put himself to the proof.

(j) When the allegations of a declaration although technically sufficient are yet in such terms that defendant cannot safely tell therefrom what particular defense he is required to make, or how to make it, he may move the court to require the plaintiff to furnish a bill of particulars showing more specifically what the plaintiff is relying on, the motion stating what are the particulars about which the defendant desires to be more definitely advised.[18] And when the bill of particulars is furnished the defendant may object to the sufficiency thereof pointing out in what respect the bill is not sufficient. The bill of particulars does not become a part of the declaration. And when affirmative matter has been pleaded in avoidance in any subsequent pleading, the pleader may be required on motion to make it more specific.

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[18] *See* MISS. CODE ANN. § 1499 (1942).

Background to the New Act

Such were (1) the experiences in our early years under common law pleading; (2) the reform of 1850; (3) the recession of 1857; and in brief, so far as here pertinent, (4) the rules of common law pleading (a) without statutory changes and (b) with such changes as were heretofore made. It is entirely probable that the rules as they had existed for the ninety years since 1857 would have continued for many more years except for the intervention of two important events.

With the increase of civil business in the courts begining with or soon after the turn of the present century, incident upon the advent of improved facilities for communication and the growth of commercial activity of almost every kind in the state, there was an accentuated tendency to take civil litigation to the chancery courts. In 1900 there were only seven chancery districts in the State; today there are fourteen.

As this increase of important business pressed upon the chancellors, they found that pleas in chancery were too often being used to ensnarl and delay final disposition. And at a meeting held at Brown's Wells in 1921, they took steps which resulted in the selection of a committee to prepare a legislative act for the modernization of the pleadings and practice in the courts of equity, and, after the usual struggle which attends about all reforms in practice, the Chancery Practice Act of 1924 was passed as Chapter 151 of the Laws of 1924. The central and most important section of that Act was Section 11, now Section 1290 of the Code of 1942, which is as follows:

> Answer—pleas in chancery abolished—all defenses made in answer. Pleas in chancery are hereby abolished and every defense heretofore presentable by plea shall be made in the answer; and the answer may state as many defenses, as in law or in fact, the defendant may have to the bill or petition or to any material part or parts thereof. But if matter which heretofore could constitute a plea be set up in the answer in such a manner as to be clearly distinct and readily separable and go to the entire present cause of action it may, on motion of either or any of the parties, be separately heard and disposed of before the principal trial of the cause, in the discretion of the court; and the motion shall of itself, without further formalities or any specifications of grounds, operate (1) to set the said matter of plea for argument upon its sufficiency in law, and if held sufficient in law (2) to put it in issue upon its facts, and no replication shall be necessary. And if the defendant fail to sustain the matter of the plea so heard, upon which matter, after motion made, he shall have the burden both as

to the law and the facts, he shall nevertheless then have the right to go on to trial upon his answer as a whole.

In spite of dire predictions by its original opponents, the Chancery Practice Act has operated with such a complete measure of success and with such ease of application that today it is approved without a voice of dissent. In the twenty-four years since its enactment, only two cases have reached the Supreme Court in which the quoted section has been involved, and these dealt only with minor phases of it.

Then came in 1938 the Federal Rules of Civil Procedure. The most important rule in it, and which is to us the most interesting in the present connection because of its identity in substance with the above quoted section of our chancery practice act, is as follows:

Rule 12(b). "Every defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto . . . except [certain named defenses which] at the option of the pleader [may] be made by motion." Rules 7(a) and 7(c) had provided that, "Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used," and that there shall be only a complaint and an answer, and a reply to a counterclaim.

At first the attitude of the majority of the bar of this state towards the federal rules was one of aloofness, if not of disapproval, but soon it was found that, when they could do so, many litigants were going into the federal court in law cases in preference to the state circuit courts. A movement to bring our state practice into conformity with the federal rules, feeble at first, gained strength and a bill to that effect, drawn by the Commissioners of the State Bar, passed the Senate in 1944. A short practice act endorsed by the state judiciary embodying in brief the gist of the federal rules passed the House in 1946.

With the endorsement of the State Bar, a proposal in broad form for reform in practice and procedure was presented to the legislature in 1948 with the result that what is said to have been a compromise between the differing opinions on the subject was enacted as House Bill 530. There is an interesting parallel here: It required a century's struggle to bring about procedural reform in England, and it took us a hundred years to recover what we had gained in 1850.

Analysis of the New Procedure

In putting the new Act together the legislature borrowed nothing from the outside. It used our own materials. Its first section is a literal copy

of Section 1290 of the Code of 1942, quoted above and with the addition of the clause later to be mentioned.[19]

The first important question which Section 1 of House Bill 530 presents is whether a general demurrer may be incorporated in the answer, and if the response to this is an affirmative, then whether it must be so incorporated, or, instead, may be separately filed. Inasmuch as the section expressly allows the defendant to present in his answer any defense *as in law* or in fact he may have, and inasmuch as courts are not authorized to strike an express provision from any statute, if such a provision can have any reasonable operation within the statute,[20] it is not seen just now how the courts may deny a defendant the option to insert his defense in law by a general demurrer in his answer as is done in chancery. For, inasmuch as a general demurrer is a defense in law, it matters not that it is called by the latter name rather than naming it a demurrer. It is the substance of a pleading which controls rather than the name by which it is called.[21] It is the dominant purpose of the Act, one which thoroughly commends it, to bring all the issues both of law and of fact at once before the court so far as practicable so to do, and not in piecemeal.

On the other hand, because the statute does not expressly repeal Sections 1490, 1491, 1492, and 1493 of the Code of 1942, dealing with demurrers and, because repeals by implication are not favored, it is probable that the courts will hold that a defendant may still file a separate general demurrer, and that, as at present, he need not answer until his demurrer has been disposed of. If his demurrer is overruled, he may then answer, as under Section 1491 of the Code of 1942, he could plead, provided his answer is in bar, contains no matter in abatement, and is sworn to.

The Study Committee of the State Bar took notice of the matters mentioned in the two foregoing paragraphs and recommended—and the recommendation was approved by the State Bar at its 1948 meeting—that Section 1 of House Bill 530 be amended so as to include the following:

> The defendant may incorporate a demurrer in his answer or may demur separately prior to the filing of his answer. But the filing of a separate demurrer shall waive any matters in abate-

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[19]The change is set forth in italics as follows: "Pleas in circuit court are hereby abolished and every defense heretofore presentable by plea shall be made in an answer; and the answer may state as many defenses, *whether consistent or not and whether heretofore made by plea in abatement or plea in bar,* as in law or in fact, the defendant may have to the declaration or to any material part or parts thereof." Advance Sheet 6, General Acts of Miss, 1948, H.B. No. 530, § 1.

[20]*See* Note 45, 39 C.J. 995; 50 Am. Jur. 361.

[21]Mahaffey v. Mahaffey, 176 Miss. 733, 738, 170 So. 289 (1936); Shapleigh Hardware Co. v. Brumfield, 159 Miss. 175, 181, 132 So. 93 (1931).

ment. Demurrer shall be heard before the principal trial of the cause but after disposition of abatement matters.

It does not require a statute to establish the rule that the filing of a separate demurrer, one which goes to the merits, will waive all matters in abatement. Therefore if the courts should hold, as it seems they must, that under the Act as it now stands a defendant may incorporate a general demurrer in his answer, there will be the following advantages to the defendant in his doing so: It will not waive the matters of abatement contained in his answer, although, of course, he must by motion call up his matter of abatement for disposition before he presents his matter of demurrer, and he must call up his demurrer before he is to be heard on the facts in bar, this being required by the present rules of practice, not changed by the new Act, either expressly or by implication; and if his demurrer is overruled he will have his answer already lawfully on file and will not have to go through the process laid down by Section 1491 of the Code of 1942. If, however, he intends to stand on his demurrer and has no purpose to plead further, he will save trouble by filing his demurrer separately and alone.

It will be noted that in the foregoing paragraphs dealing with a demurrer the observations have been as regards general demurrers. This is correct, because as already heretofore mentioned, a previous statute, untouched by the new Act, had abolished special demurrers.[22] Interpreting this statute, the court has held in *Aetna Insurance Company v. Commander*[23] that "the only defect in a pleading rendering it insufficient on a demurrer is that it fails to state a cause of action or defense;" hence abatement matter, if made available on the face of the declaration, must be called up and dealt with by motion and not by demurrer. And if the abatement matter is set up in the answer, that matter must be called up by motion before the merits are touched, in obedience to the common law rule heretofore stated that abatement matter "must be presented, if presented at all, first before the defendant has demurred or plead to the merits." The new statute allows the defendant to answer to the merits along with his answer as to matters in abatement, but does not change the rule that the latter must first be disposed of.

The Study Committee of the State Bar further recommended that Section 1 of House Bill 530 be amended as follows: "If the answer shall contain matters in abatement, the same shall be taken to be waived by the defendant unless he shall by motion set the same up to be heard separately before the hearing of the demurrer, if any, and before the trial on the

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[22] *See* note 8, *supra*.
[23] 169 Miss. 847, 852, 153 So. 877 (1934).

merits." For reasons already stated it is submitted that this amendment is not necessary, because it would merely affirm what is the rule without it, upon principles already mentioned, and if it is held that a defendant may, under the present Act, incorporate a general demurrer in his answer, neither of the proposed amendments is necessary.

Two other questions present themselves under Section 1 of the new Act. The first of these is as to precisely what must be the contents of that which is set up in the answer as matter of special plea. About the best reply to be given to this question, if the reply is to be brief and at the same time comprehensive, is this: The answer must bring forward and state a fact or group of facts, omitted from the declaration, but which if alleged in the declaration, would have made it demurrable. In doing so, matter in avoidance will not qualify the denials, the common law rule as to color having been abolished by another statute, as heretofore mentioned; nor will the allegations of the plea matter be bound to any ties of consistency either as regards the denials or as to any other separate affirmative defense that the answer may make, the language of the section expressly so providing.

Secondly, what is meant by the requirement that in order to enable plea matter to be separately presented on motion, the plea matter must be "set up in the answer in such a manner as to be clearly distinct and readily separable. . .?" This means that the matter which could constitute the particular plea shall be distinct and complete, with a clear statement of the ultimate fact or the assembly of facts which converge to constitute that plea and not some other, and so framed into the answer as to be a unit within itself and to be understood as the plea part without any necessity of searching it out or of piecing it together from other parts of the answer.

A suggestion has been made that it would be helpful if model forms of the separate statement of plea matter in the answer and of the motion for a separate hearing on it were annexed as an appendix to this article. Usable forms for the motions may be found in Section 340 of Griffith's *Chancery Practice,* and for the separate plea matter, see pages 876 and 877 of the same book.

It has been mentioned that in Section 1 of House Bill 530 there is inserted a clause not found in Section 1290 of the Code of 1942, which is the chancery statute. This additional clause allows the defendant to make in his answer as many defenses as he may have "whether consistent or not and whether heretofore made by plea in abatement or plea in bar."[24] Inconsistency or repugnancy was as much against the principles of good pleading under the common law in its best days as a science as it ever has been in

[24] *See* note 19, *supra.*

equity. But with the abolishment of express color, the allowance of the pleading together of several pleas in bar along with the general issue, and of several replications, and likewise as to subsequent pleadings, all of which appeared in the Code of 1857, consistency largely disappeared in the courts of law. The new Act merely repeats the allowance and in the broadest terms, but no broader than Rule 8(e)(2) of the Federal Civil Rules which provides that "a party may state as many separate claims as he has regardless of consistency. . ."

It seems hardly necessary to say that the new Act abolishes replications and all the common law pleadings subsequent thereto, and this for the obvious reason that a replication presupposes a plea and the Act abolishes pleas.

The Act expressly allows any separate plea matter, whether in abatement or in bar, to be separately called up and tried in advance of the other matters pleaded. It has been suggested that this ought never be allowed as to plea matter in bar, making it necessary that more than one jury be empanelled in the same case. It is said that this is not allowed even under the federal rules with all their liberality.[25]

On the other hand, to hear separately the separate plea in bar gets back to the policy of the common law in its brightest days of the past—presenting and trying only one clearly presented issue in each case, as has heretofore been mentioned. There will be cases where the advantage in that course will be plain. For instance, a case of a wide range of complicated facts is about to be set for trial. The answer has pleaded a written release, exhibiting a copy of it, and the statement by the plaintiff in response adequately avers that the release was fraudulently obtained. This issue could be tried in an hour's time and if decided in favor of the defendant would end the entire case, which if tried on all the issues would have required three days. Here, then, is a sufficient guide: If it seems clearly probable that there is a real chance to save time and expense by the separate hearing, this course should be pursued; but if this is doubtful the whole case should be heard at one trial. Since this is within the discretion of the trial judge, it is not seen how his action in the matter could ever be made the subject of appellate review.

Section 2[26] of the new Act is simply a copy of Section 1291 of the Code of 1942, in the chapter on chancery courts, and has been in all our Codes since Articles 44 and 45, Chapter 62 of the Code of 1857. All the annotations in the Code of 1942 under that section will fully apply to Section 2

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[25] *Compare* FED. R. CIV. P., 12.
[26] *See* note 12, *supra*.

in the new Act, making further comment unnecessary except as will be later mentioned in connection with unsworn answers.

Section 3[27] of the new Act is a verbatim copy of the last two sentences of Section 1300 of the Code of 1942, which is taken from the Chancery Practice Act of 1924. In the twenty-four years during which the section has been in our statutes it has given no trouble whatever, its terms being so plain and easily understood that it carries upon its face all of the explanation it needs.

Section 4 of the new Act is a paraphrase of Section 1480 of the Code of 1942. Old Section 1480 was designed to move with the plea of the general issue as a pivot, but inasmuch as by the new statute the plea of the general issue is abolished, the answer being substituted, and that by his answer defendant must specifically either admit or deny every material allegation of the declaration, it was necessary to reconstruct old Section 1480, and the new section representing it reads as follows:

> Section 4. That if the defendant desire to prove by way of defense in an action, any affirmative matter in avoidance, which by law may have been proved heretofore under special plea he shall set forth in his answer to the action such affirmative matter and incorporate such defense therein, otherwise such matter shall not be allowed to be proved at the trial; and said answer shall fully set forth any special matter which the defendant intends to give in evidence in bar of the action; and when such matter shall have been set forth in said answer, the plaintiff shall, before the trial of the cause, file a written statement of any special matter which he intends to give in evidence in denial or avoidance of such special matter so given in the answer by the defendant, and to which it would have been necessary heretofore to reply specially had the defendant's defense been specially pleaded; and if such special matter be not so alleged by the plaintiff, evidence of such matters shall not be given at the trial.

It is to be seen that this section bears a close relationship to Section 1. The first question under it, therefore, is whether in order to avail of its allowances in the matter of making proof, it is necessary to set up the plea matter with the separable distinctness which is required for a separate hear-

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[27]"If an answer be deemed insufficient in law a plaintiff may, at such time as the court may allow, test the legal sufficiency of the same, or of any part thereof, by a motion to strike out. If found insufficient but amendable the court may allow an amendment on just terms, and if not amendable may strike out in whole or in part. In imposing terms the court shall avoid so far as possible any unnecessary delays in the final hearing of the cause." Advance Sheet 6, General Acts of Miss. 1948, H.B. 530, § 3.

ing under Section 1. There seems to be no sound reason on the question of admissible proof to require an opposite party to search out or piece together plea matter from other parts of the answer, and thereby be charged as with notice of a plea part, than he would be charged for a separate hearing under Section 1. Hence in this respect the same requirements should prevail as to both situations.

The second question is whether the written statement by the plaintiff in reply to the special matter set up in the answer of the defendant shall be separate and distinct, rather than to be searched for by the opposite party, and the answer to that question ought to be as indicated in the next foregoing paragraph.

And the third question is whether the plaintiff in his reply statement to affirmative plea matter in the answer may give in his statement several distinct replies to the same affirmative plea matter or whether he will be confined to a single reply statement in analogy to the common law rule that there could be but one replication to a plea, it being noted here that the new Act expressly repealed Section 1486 of the Code of 1942, the section allowing several replications to a plea.

The language of this Section 4, in referring to what the defendant may present, uses the singular, "any special matter", when Section 1 allows him to present as many special matters in avoidance as he has. The use of the singular in Section 4 as to what the plaintiff may present must be construed, therefore, to embrace also the plural, and to mean that the plaintiff in his statement may present as many special matters as he has against any single plea matter set up in the answer by the defendant.

The fourth question arises out of the general rule that nothing is receivable in evidence not within the terms of, or covered by, the pleadings under which the evidence is offered, and the question is: If the defendant desires to prove special matter in avoidance of the special matter contained in the plaintiff's responsive statement, must the defendant in order to do so amend his answer and set up therein his special matter in avoidance of the special matter in plaintiff's statement, or may the defendant make his proof without any amendment to his answer as already on file?

As heretofore stated, Section 4 of the new Act is a rescript of old Section 1480 of the Code of 1942, redrawn so as to fit into the new Act. The purpose of old Section 1480 was to allow the case to be presented without any special pleas, if the pleader elected to take that course. Section 4 of the new Act abolishes special pleas and the pleader has no election; but the ultimate purpose of both was and is the same as regards the presentation thereby of all the issues in the case. In the ninety years during which Sec-

tion 1480 was in our Codes it was never held that it was necessary for the defendant to amend or supplement his notice given under the plea of the general issue in order to prove in his behalf any affirmative matter in denial or avoidance of the special matter of which the plaintiff in reply had given notice, and there ought not be any difference made under the new section. The plaintiff complies with the statute when he files his statement immediately "before the trial." It was never contemplated that additional or amended statements or notices or pleadings would thereupon be required—to the delay or postponement of the trial. The court will have inherent power to have the case so conducted as to allow the parties, or either of them, to meet surprise.

The Study Committee of the State Bar recommended that Section 4 be amended so as to permit the defendant to test by motion the legal sufficiency of the special matter by plaintiff in reply. If the Act is to be amended at all it would be well to include the amendment suggested, but the item mentioned in this paragraph would not seem to be of sufficient importance to call for an amendment as to it alone. The legal sufficiency of the special matter is a question that may be raised by objection to the testimony supporting it when offered, as was done as to such matter under old Section 1480 of the Code of 1942. And it is suggested that a motion to strike may be entertained in the discretion of the court without a statute expressly so allowing, because where a procedural point is available to any party and there is no regular pleading by which he may present it, he may do so by motion. In a recent case the Mississippi Supreme Court has said that the remedy by striking a pleading will be allowed when there is no other available method of plenary pleading and when the justice of the motion is so clear as to be fairly indisputable.[28] If, then, the special matter by plaintiff in reply is plainly and clearly insufficient on its face, and to keep it in the case until it could be met by an objection to the testimony would surely result in no more than a loss of time and expense in the useless production of witnesses to be offered to prove the insufficient special matter, the court could and should entertain a motion to strike it.

Thus, as already said, there is nothing new in House Bill 530. It simply takes time-tried machinery and puts it to use in the circuit courts, where it has been long overdue. And seldom in a single legislative act has so much ground been so well covered in so few words, and it did not cover more ground than a majority of the bench and bar were willing to see covered at this time.

To be sure, there are many earnest and sincere members who have felt like mourners at what they call the death of common law pleading. They

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[28]Jenkins & Boyle v. Rogers, 184 Miss. 182, 193, 185 So. 603 (1939).

mourned when dower, curtesy, coverture, and private seal passed away. But the consistent and logical system with all its artistic symmetry which was common law pleading, and which in the early days did so much to help shape the substantive principles of the general law of this country—and at the same time did so much to prevent litigants from obtaining the benefits of those principles—had already been dead since 1857. In the main what was left of it were its dry bones, some still useful but most of them operating to impede the prompt dispatch and the economical trial of civil law business.

The modern conception of procedure is that it shall be an aid always, and never a hindrance, in the prompt determination of cases honestly presented on their merits. There cannot now be any doubt that the judiciary and a clear majority of our bar had come to the conclusion that the plea of the general issue has no longer any legitimate place in a fair and honest civil procedure; that a defendant should no longer be permitted to plead falsely what he and his witnesses could not truthfully deny or assert on the witness stand; and that any system which requires that a plaintiff or complainant shall lay his cards on the table face up, as he must do by his declaration or bill, should require also that a defendant must do the same by an answer, with all of his cards face up.

But it has been commented that, because the answer is not required to be verified by oath or otherwise, the purposes of House Bill 530 can be thwarted by an answer which denies one by one every material allegation of the declaration, whether the denials are true or false, and that when such an answer comes in we have at last no more than what was the plea of the general issue. Plainly the central purpose of the Act is to simplify, expedite, and economize in the administration of civil law litigation. Any conduct wilfully done which is calculated to impede, embarrass, defeat or obstruct the administration of justice is a contempt. In *Biloxi v. Lowery*,[29] the Supreme Court said:

> The making of false affidavits to bills or answers which the party or parties should have known were untrue and which results in impeding or obstructing justice should properly be held to be a contempt, 13 C. J. 9; and it is to be regretted that, in clear cases, of which there are so many, our trial courts have not undertaken to enforce that salutary rule.

There the Court was speaking of false affidavits to pleadings, but there can be no substantial difference whether the wilfully false pleading is sworn to or not, for it is the calculated effect of its falsity which constitutes the

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[29] 179 Miss. 364, 375, 175 So. 200 (1937).

contempt. Here then is a remedy against deliberate and wilful evasions of the purposes of House Bill 530. It was once said by a great law writer that "if men were to use falsehood in their common transactions as much as they are allowed to do in their legal pleadings, there would be but little confidence between man and man."

One of the few serious defects in our present chancery procedure is the allowance of a waiver of an answer under oath, the result of which is often that the defendant, while pretending to comply with Section 1291 of the Code of 1942, as to the contents of an answer, will deny one by one every material allegation of the bill, so that at last the answer amounts to a general traverse which the section seeks to forbid. Often records come to the Supreme Court in several volumes aggregating hundreds of pages and which required several days to try, when, if the pleadings had been fairly truthful, only one small volume of record and only a part of a day in trial would have been necessary. To meet this, as well as what has just been said as to House Bill 530, we seriously need a supplementary act such as was proposed by Section 3 of the Short Practice Act, which passed the House in 1946, and which is similar in substance to Rule 11 of the Federal Civil Rules, the section being as follows:

> Section 3. Except where otherwise specifically required by statute, except in probate matters, and except in suits for discovery, pleadings need not be under oath and the rule in chancery as to the effect of a sworn answer is hereby abolished. In suits for discovery both the bill and the answer shall be sworn to, and if the bill or answer is by a corporation it shall be sworn to by an officer or executive agent thereof, but it need not be under the corporate seal.
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> Every pleading filed in the circuit or chancery or county court shall be signed by the party or his attorney, and if the party is represented by a firm of attorneys the pleadings shall be signed in the firm name by a member thereof and such signature by the party or attorney shall constitute a certificate by the party or attorney that he has read the pleading; that to the best of his knowledge, information and belief there is good ground to support it and that it is not interposed for delay. If a pleading is not signed, or is signed with the intent to defeat the purpose of this Act, it may be stricken as sham or false, and the action or cause may proceed as if the pleading had not been filed. For a wilful violation of this section an attorney may be subjected to appropriate disciplinary action, and it shall not be competent in any case for any party to waive the provisions of this section.

Section 5 of the new Act provides "that sections 1476, 1477, 1478, 1486, 1488, be and the same are hereby specifically repealed and all other laws or parts of laws in conflict herewith are repealed to the extent of such conflict." It is understood that some question has been raised as to the validity of the Act because the quoted section does not state to what Code the enumerated sections therein contained refer. When the intent of the legislature is clearly manifest from the entire context of an act, the court will insert the words necessary to effectuate that intent, and so here will insert "Code of 1942."[30]

On June 25, 1948, a full preliminary draft of the foregoing article was sent by mimeographed copies to each of the circuit and county judges in the State with the request that by August 15, each would advise whether in his opinion the questions discussed were correctly answered, and that each would suggest any additional questions which should be covered in the article.

The replies received were unanimous that the questions raised were correctly answered; and five additional questions were advanced. Three of these are closely related to those mentioned in the original draft and have been answered by supplementary matter.

The other two questions are:

1. Does the Act apply to the county courts? This question has been raised because of the opening language of the first section, "pleas in circuit court." But the language of Section 1607 of the Code of 1942 plainly prescribes that the rules of pleading in the circuit court as "now or hereafter established" shall be the rules in the county court in law cases. The answer is that the new Act applies to county courts.

2. Does the Act apply to the extraordinary legal proceedings such as in replevin, ejectment, mandamus, quo warranto, and others? The rule is that where a special and particular statute deals with a special and particular subject its particular terms as to the special subject control over general statutes dealing with the subject in general.[31] The answer is, then, that the new Act has no application to the special subjects mentioned if the special statute prescribes the rules of pleading for the particular proceeding and the rules so prescribed differ from those in the new Act.

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[30]*See* annotations in 3 A.L.R. 404, *et seq.*, and 126 A.L.R. 1325, *et seq.*
[31]Price v. Price, 32 So.2d 124, 126 (Miss. 1947).

AN INTRODUCTION TO THE MISSISSIPPI WORKMEN'S COMPENSATION ACT

*John C. Satterfield**

Although sixty-six years have passed since workmen's compensation legislation was first enacted in Europe on a national scale and it has been forty years since this principle was first put into effect in the United States, Mississippi workmen and Mississippi industry have never felt the beneficent effect of the principles of workmen's compensation. This situation will be remedied on January 1, 1949, when House Bill 351 of the Regular Session of 1948 goes into effect. Mississippi lawyers will be faced with a complete statutory method of redress radically different from the principles of law and procedure under which they have always practiced, together with a body of judicial decisions from every state in the United States and from the federal courts with which they are totally unfamiliar. As the author is a Mississippi lawyer, this article is written simply as a general introduction to the Mississippi Workmen's Compensation Act from the viewpoint of a lawyer approaching a strange and unfamiliar field of law. The most that will be attempted will be a general discussion of the background of such legislation, a partial comparison of this statutory scheme of redress to the common law remedies, with which we are all familiar, and a comparison of the main features of the Mississippi Act with similar acts in the other southern states.

Workmen's compensation legislation first appeared in Germany. As the industrial problems of Germany increased under Chancellor Bismarck in 1880 and succeeding years, the cause of the great masses of the workers was spearheaded by the Socialists, who in that generation threatened the conservative governments of the world as such governments are now threatened by the Communists. To meet the demands of the rising tide of Socialism, Chancellor Bismarck and his government adopted several types of socialistic legislation including an act from which has developed the modern workmen's compensation legislation. This was known as the Accident Insurance Law of 1884, which was several times amended and finally revised and codified in 1911 as a complete workmen's compensation act.

The success of this type of legislation in Germany led to a popular demand for a similar protection for the workers in Great Britain and in 1897 the limited Workmen's Compensation Act of 1897 was enacted. The experience thereunder was satisfactory, and in 1906 the act was extended to most employments in the United Kingdom by the adoption of a legislative scheme which has proved to be the basis of such legislation in the

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United States. For more than a hundred years the employees of the federal government in the United States had been without legal redress for injuries suffered within the course of their employment and had been forced to rely upon special acts of Congress for compensation for each particular injury. This highly unsatisfactory situation resulted in President Theodore Roosevelt's recommending and obtaining the passage of the Federal Employees Workmen's Compensation Act which was adopted by Congress in 1908. This has since been replaced by a much more complete and satisfactory act applicable to certain classes of employees of the federal government. A voluntary act was adopted by Massachusetts in 1908, but the same was unsatisfactory, and several acts adopted by other states within the next year or two were either held unconstitutional or proved to be without great value. In 1911, however, ten states adopted workmen's compensation acts and by 1918 such laws were in force in thirty-seven states and three territories. By 1921 workmen's compensation acts had been adopted by all of the states in which there had been any considerable industrial development.

At the time of the adoption of the Mississippi Act all of the states had been under workmen's compensation legislation for many years, the last state prior to Mississippi being Arkansas, which adopted an act effective June 8, 1939. Therefore, there were not only forty-seven state acts in effect but also acts in Alaska, the District of Columbia, Hawaii, Puerto Rico and the Federal Longshoremen's Act and Federal Employees Act. In spite of this fact the United States Department of Labor estimates that not more than 50% of gainfully employed workers are actually protected by workmen's compensation. This is due to the fact that in many laws the coverage is elective as to all employments other than hazardous employments; employers having fewer than a specified number of employees are exempted; farm labor, domestic servants, casual workers and employees of charitable institutions are generally excluded; and the workmen's compensation acts do not apply to those interstate transportation workers and maritime employees covered by the Federal Employers' Liability Act and the Jones Act.

There are many fields of human relationships which the delays occasioned by our archaic methods of process, the infrequent terms of court and our ancient judicial procedure, although not causing severe hardships, result in inconvenience and dissatisfaction. However, in the field of industrial injuries the employee is frequently unable to provide for himself the necessary medical and hospital care and the funds necessary to allow a reasonable time in which to rebuild his health after injuries received in the course of employment. Usually funds do not remain to properly provide for surviving dependents in death cases. A large sum received one, two or

three years after the accident may find irreparable damage done that could have been averted by a quick decision and a reasonably certain remedy.

Recently we have seen the legitimate field of the courts invaded upon every side by the creation of administrative tribunals. The quasi-judicial bodies not only reduce the field of service of the judicial branch of the state and federal governments, but are rapidly shrinking the scope of the practice of law until the lawyer is circumscribed on every hand by artificial barriers erected by the legislative branch in an attempt to streamline and expedite redress of human wrongs. The traditional reluctance of the legal profession to allow legislative changes in the slow and tedious process of the courts has turned the body of the people against the use of the courts except when they are the only means available to right a wrong. The full effect of this trend was not seen until the last few years, but what may be regarded as the first great step in this direction was taken in the acceptance of the principles of workmen's compensation legislation resulting in the abandonment of common law rights and remedies and, in almost every instance, in the creation of administrative tribunals for the enforcement thereof. One of the early workmen's compensation acts adopted in the United States was that of Iowa which became a law in 1913. The reasons that such legislation has swept the country were graphically stated by Judge Smith McPherson[1] when the constitutionality of such act was questioned as follows:

> All thoughtful persons agree that present conditions call for legislative, judicial, or economical relief, one or all. Enterprises such as railroads, street car lines, interurban lines, manufacturing plants of all kinds, with rapidly moving machinery, usually hazardous, with the dangerous invisible electric current of high voltage, the agency of steam, geared with cogwheels, belts, pulleys, and other appliances, are killing and crippling thousands and thousands of persons every year. This is so even when the employees are sober, attentive, and watchful, and is materially increased when such persons, or some of them, are negligent. This means poverty and distress, and is followed by charities, and too often filling the poorhouses and sanitariums. The man with an eye gone, a leg or arm off, or otherwise physically or mentally impaired, has but a limited or no chance in life. This burden sometimes falls upon the injured person alone, sometimes on the wife, children, or parents, and often on the general public by increased taxation. Presidents, congressmen, legislators, and men of eminence for years have been urging actual reforms in these matters, and the employees have been insisting upon relief. All persons know these things to be so, and the literature and debates for years have been devoted to the query as to the solution and remedy. The courts

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[1]Hawkins v. Bleakley, 220 F. 378 (S. D. Iowa 1914), *aff'd* 243 U.S. 210 (1916)

> have not been lagging so much as retrograding in dealing with the subject. The time of the courts is consumed in listening to the harrowing stories, sometimes of truth and sometimes of perjury. Claim agents are busy from the hours of death or injury in locating and preserving the testimony that the corporation may be protected. The friends and lawyers and agents of the dead and injured are equally industrious. We often see advertisements in the press of 'witnesses wanted to the occurrence'. We have new words in the dictionary, but the new words 'snitches' and 'ambulance chasers' are of the simple and well-known language. Verdicts must be for twice the fair amount to be awarded as damages, so as to allow the 'contingent fee' or the injured man, his widow, or children, must accept half the sum justly due. And these results are only obtained after years of litigation. Sickness, unavoidably out of town, urgent business in other courts, prolong the litigation. When judgment is at last obtained in favor of the one side or the other, appeals, certiorari, mandamus, and writs of error, one or all, are sought, and then sometimes reversals, and then other delays. Sometimes verdicts are returned, and later on it is ascertained that the testimony was to meet the law of the case. Sometimes the verdicts are returned for only part of the sum that should have been awarded, and sometimes the verdict is followed by getting well so speedily as to be termed almost miraculous. So that, regardless upon which side the greater wrongs occur, a question no one can decide, all ought to concede that which is the truth, that the best the courts can do in many cases is frailty itself.

The theoretical basis of workmen's compensation legislation is radically different from the theoretical basis of common law liability. It has been estimated that of the total number of injuries occurring during the existence of the employee-employer relationship less than one-third are caused in whole or in part by the negligence of the employer. Under the common law the employee had no redress unless negligence of the employer existed, even though he may have been injured while directly engaged in the industrial process and his loss was one which grew out of that process. One of the justifications for workmen's compensation legislation is that the employer and employee are engaged in a common enterprise to which the employer contributes the capital and the facilities and the employee contributes his services, the employer receiving his return as the profits of the business and the employee receiving his return as wages. Every injury received in the course of the employment is considered a part of the industrial or business process and the loss resulting therefrom is considered a legitimate expense of such process. Workmen's compensation actually makes the employer an insurer of all of his employees regardless of negligence or fault, subject only to certain narrow exclusions and to reasonable limitations upon the amount of the benefits received to compensate for the loss arising out of such injuries. Theoretically, however, the courts are slow to admit that the employer has actually become an insurer under

workmen's compensation. Hence, subject to certain limited exclusions, where the employer comes within the provisions of a workmen's compensation act, the material questions to be determined are whether or not the injured party was an employee acting in the course of his employment when the injury occurred, whether the injury was out of his employment, and the extent of such injury. No question of negligence arises.

It is beyond the scope of this article to discuss the constitutionality of workmen's compensation legislation, but it is interesting to note that three of the four acts adopted prior to 1911 were declared unconstitutional, these being the Maryland Act adopted in 1902, the Montana Act adopted in 1909, and the New York Act adopted in 1910.[2]

When the case of *Hawkins v. Bleakley*,[3] involving the Iowa Act, reached the Supreme Court of the United States on March 6, 1917, that court also had before it the question of the constitutionality of the New York Act and the Washington Act. The decisions in these cases[4] may be said to be the turning point of the judicial attitude in the United States toward such legislation. Since that time the courts of practically every state in the Union have upheld the constitutionality of workmen's compensation legislation.

One classification of compensation legislation is whether the law is an elective or compulsory act. An elective act is one in which the employer (or in some instances the employee) has the option of either accepting or rejecting the act, but in most instances if the employer rejects it he loses the customary common law defenses—assumption of risk, the fellow servant rule, and contributory negligence. Some acts are generally classified as elective and apply to certain named hazardous employments as a compulsory matter but are elective as to all other employments. The United States Department of Labor classifies twenty-six of the workmen's compensation acts as compulsory and twenty-seven as elective.

The Mississippi statute is a compulsory statute applicable to all types of employment whether hazardous or not, with the exception of those which have in service less than eight workmen or operators regularly in the same business and, regardless of the number employed, the further exception of domestic servants, farmers and farm labor, nonprofit charitable, fraternal,

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[2]American Coal Co. v. Allegany County Comm., 128 Md. 564, 98 A. 143 (1916); Cunningham v. Northwestern Improvement Co., 44 Mont. 180, 119 P. 554 (1911); Ives v. South Buffalo Ry., 200 N.Y. 271, 94 N.E. 431 (1911).

[3]*See* note 1, *supra*.

[4]New York Central Ry. v. White, 243 U.S. 188 (1917); Hawkins v. Bleakley, *supra* note 1; Mountain Timber Co. v. Washington, 243 U.S. 219 (1917).

cultural or religious corporations or associations, and transportation and maritime employments for which a rule of liability is provided by the laws of the United States. Therefore, Mississippi has one of the most modern acts from the viewpoint of employments covered and the relative number of employees benefited thereby. However, no provision is made for municipal, state or other public employees.

Three methods of assuring payment of benefits to employees have been adopted in the various states. In seven of the states there has been provided an exclusive state insurance fund to which the employers are required to contribute on a basis set up under the act and from which all benefits are paid; in eleven additional states the employers may elect whether they will contribute to and be protected by the state funds or insure with private companies, these being called competitive state fund states; in the remainder of the forty-seven states having workmen's compensation prior to the adoption of the Mississippi law, the employers are required to obtain coverage with private insurance companies or to qualify as self-insurers. Mississippi has adopted the latter plan and under the present act employers must either obtain coverage in licensed insurance companies or demonstrate to the Commission that they are ready and able to pay all losses, and, if required, to give security for the payment thereof, thereby qualifying as self-insurers. No state fund is contemplated in the Mississippi Act.

The history of social legislation shows a legislative practice to increase the benefits received from time to time, but to decrease such benefits only in very exceptional cases. It appears that the history of workmen's compensation legislation throughout the United States has followed this pattern. In the year 1947, twenty-two states provided for increased benefits in different particulars, and coverage of occupational diseases was added in six states. It is improbable that the benefits provided in the Mississippi Act will be generally reduced, and it is therefore significant to find, as described below, that the benefits provided under this Act are very liberal in comparison to other states, similarly situated to Mississippi.

Over the years the common law and even the Constitution of the United States itself have gradually crumbled before the constant pressure of public necessity. The straws of public opinion have been combined with the clay of judicial construction to form bricks used to shatter the words of the Constitution and to upset in a few years the principles of common law molded by centuries of development. In justifying workmen's compensation legislation the courts have displayed a complete lack of unanimity in attempting to define the nature of the obligation resulting from the statute and the legal relationship of employer and employee. Some courts have held that the obligation to pay and the right to receive compensation is

contractual;[5] others have held the obligation to be contractual under the elective acts but not under the compulsory acts;[6] the contractural nature of the obligation is abandoned in other cases and the same is said to arise from status rather than from contract.[7] It seems that the better opinion is expressed by the Supreme Court of New Jersey in the case of *American Radiator Co. v. Rogge,*[8] as follows:

> The liability is indeed contractual in character by force of the very terms of the statute, but is not the result of an express agreement between the parties; it is an agreement implied by the law, of a class now coming to be called in the more modern nomenclature of the books 'quasi contracts'.

Regardless of the theoretical nature of the obligation arising from the law, the Mississippi compulsory statute will remove from the ken of the practicing lawyer the mass of decisions defining the liability in tort of the employer to the employee. Only in the instances mentioned above, which are specifically excluded from the Act, will these decisions be pertinent.

As the Act is exclusive, and destroys all common law rights and remedies within its limits, the paramount interest of Mississippi lawyers will be the extent to which it abrogates the common law rule of liability of employer to employee for injuries sustained in the course of employment and the practical effect of such changes. Among these are the following:

1. (a) Under the common law rule the employer was only liable for injuries which his negligence proximately caused or to which his negligence proximately contributed, occurring during the course of the employment. The fellow servant rule and our statutory modifications of assumption of risk reduced the chances of recovery, and our statutory modification of contributory negligence reduced the amount of recovery.

(b) Under the Workmen's Compensation Act the employer is liable for injury occurring during the course of the employment regardless of negligence, unless occasioned by the intoxication of the employee or his willful intent to injure or kill himself or another. Occupational diseases are not affected by the Act in Mississippi. All common law and statutory defenses are abolished as no question of negligence arises.

2. (a) Under the common law the right to receive compensation and the amount thereof were wholly uncertain, depending upon the ability

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[5]Baker Tow Boat Co. v. Langner, 22 Ala. App. 575, 117 So. 914 (1928); Warren v. American Car & Foundry Co., 327 Mo. 755, 38 S.W.2d 718 (1931).
[6]Berry v. M. F. Donovan & Sons, 174 Me. 1, 115 A. 250 (1921).
[7]Cudahy Packing Co. v. Parramore, 263 U.S. 366 (1923).
[8]86 N.J.L. 436, 92 A. 85 (1914), *dissent* 94 A. 85.

of the employee's attorney and sympathy of the jury (theoretically, the reasonable discretion of a jury based upon substantial evidence).

(b) Under the Workmen's Compensation Act the right to receive compensation is absolute and the amount thereof is limited, assuming the existence of the employment and subject to determination of the nature and extent of the injury. In death cases and in most of the usual type of injuries, the amount to be received is fixed in the Act.

3. (a) Under the common law the ability of the employee to collect depended solely upon the solvency of the employer, and carrying of insurance was optional. Claims were frequently abandoned or compromised for small amounts because of lack of coverage and inability to reach assets of the employer.

(b) Under the Workmen's Compensation Act the employer must either carry insurance or assure the Commission of his ability to respond to claims and, if not insured, may be required to give security therefor.

4. (a) Under the common law the employer was subject to the possibility of unlimited liability in major accidents affecting several employees which might far exceed the policy limits in policies carried by most employers.

(b) Under the Workmen's Compensation Act, if insurance is carried there is no possibility of liability in excess of policy limits or without its coverage (except in the case of occupational diseases or upon special order of the Commission allowing a limited coverage).

5. (a) Under the common law the process of law was slow and uncertain and attorney's fees (necessarily) were usually 50% or not less than 33%.

(b) Under the Workmen's Compensation Act the attorneys' fees will be much smaller and subject to the approval of the Commission or the court, and a quick administrative method is substituted.

6. (a) Under the common law the right of the employee to receive immediate and adequate medical aid and hospital services depended upon the uncertainty of the existence of negligence and the attitude of the employer and his insurer toward the injured employee.

(b) Under the Workmen's Compensation Act immediate and adequate medical aid and hospital services are assured in an unlimited amount, including "crutches and apparatus" which are assumed to include artificial arms, legs, etc.

7. (a) Under the common law where negligence of the employer existed, the maximum limits upon amounts recoverable by the employee (and resulting exposure of the employer) were greater because the same were limited only by the reasonable discretion of a jury and full compensation was collectible in every injury or death case by the employee or his heirs, plus punitive damages for gross negligence in any case.

(b) Under the Workmen's Compensation Act the fixing of liability regardless of negligence, materially increases the number of instances in which compensation is payable, but the ultimate amount payable is reduced by many factors, including the following:

(1) The amount of compensation is limited by the Act in death claims and is fixed in most of the usual injuries. Gross maximums are fixed by the law applicable to every claim and to every element of damage except medical benefits.

(2) In injuries for which no specific compensation is provided, compensation is payable on basis of 66⅔ per cent of the difference between the employee's average weekly wages before the accident and his wage earning capacity thereafter, determined by the Commission.

(3) No additional recovery is allowed for pain and suffering nor for loss of consortium in death cases. The amounts payable are not affected by the presence of these elements of damage.

(4) No punitive damages are allowed except in injuries to or death of minors illegally employed.

(5) Compensation for death is payable only to a widow (during widowhood) or to dependents. Any death without such survivors results in payment of only $500.00 (into a "Second Injury Fund"), plus a maximum of $350.00 funeral expenses.

(6) Dependents include only persons under 18 years of age and unmarried, except parents, grandparents and dependents incapable of self support by reason of mental and physical defects. A person must be a widower, a child, grandchild, brother, sister, parent or grandparent (as defined in the law) to qualify as a dependent.

(7) Compensation for death claims are payable for a long period of weeks (maximum 450 weeks), and cease when widowhood or dependency ceases. To minors it ceases at age of 18 years or upon marriage. Except in lump sum settlements, this will frequently reduce the ultimate liability.

(8) Awards for disability are payable over a long period of weeks (maximum 450 weeks) and cease with the death of the employee from

other causes. This will frequently reduce the maximum amount actually paid. However, upon approval of the Commission, a lump sum settlement may be made at four per cent true discount compounded annually, taking into consideration life expectancy.

Employees losing all common law rights and remedies are relegated to the benefits provided in the Act, with the exception of occupational diseases. Since such diseases are not covered by the Act, it appears that the old common law rule of liability will still apply, and the Act will not exclude recovery thereunder in the courts. Of course, only injuries arising out of and in the course of employment come within the Act. Liability to third persons for injury by the employer or his duly authorized agent acting within the scope of his employment under the common law rule is not affected by the Act. It is particularly provided that if the injury is occasioned by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another, no compensation shall be received for such injury. Such injuries do fall within the exclusive provisions of the Act, but are excluded from benefits by the clause mentioned.

There are numerous particular provisions varying the application of the general benefits, but this article will not attempt to go into detail and will only give a broad view of the benefits applicable to the average situation. Such general benefits include the following:

(1) Medical benefits without limitation as to amount or time including medical, surgical, nurse, hospital service, medicine, crutches and apparatus, all subject to regulation by the Commission and in addition to other benefits.

(2) Death benefits are provided subject to the following general provisions:

(a) Reasonable funeral expense not exceeding $350.00 regardless of dependents or survivors, in addition to all other benefits.

(b) Lump sum payment to widow, if any, of $100.00 in addition to all other benefits.

(c) If no surviving widow or dependents, $500.00 payable into "second injury fund" is the only liability in addition to funeral expense.

(d) The total weekly compensation payments to all beneficiaries may not exceed 66⅔% of the average weekly wage of the employee nor $25.00 per week and the same may not be payable for longer than 450 weeks nor in a greater amount than $8,600. The minimum weekly payment is $7.00 per week.

(e) It is probable that medical benefits and temporary total disability or temporary partial disability benefits may be paid to the employee after injury and before death in addition to the death benefits provided for the survivors.

(3) The weekly benefits, under death claims, subject to the limitations stated above, are payable as follows:

(a) Widow during widowhood or dependent widower during dependent widowerhood, 35% of average weekly wage.

(b) While widow or dependent widower receive benefits, each child receives 10% of average weekly wage; in absence of payment to widow or dependent widower, each child receives 15%; benefits to children cease at age 18 unless incapable of self-support by physical or mental incapacity and at marriage before 18 unless wholly dependent on the deceased.

(c) If no such survivors or if their gross benefits are less than 66⅔% of weekly wage, then 15% of average weekly wage to dependent grandchildren or brothers or sisters less than 18 years of age or incapable of self support because of mental or physical incapacity and to each dependent parent or grandparent 25% of the average weekly wage during dependency.

(d) All questions of dependency are determined as of the time of the injury.

(e) "Child" includes a posthumous child, a child legally adopted prior to the injury, one as to whom the deceased employee stood *in loco parentis* for more than one year before the injury, a step child and an acknowledged illegitimate child; "brother" and "sister" includes stepbrothers and stepsisters, half brothers and half sisters, brothers and sisters by adoption. Upon reaching the age of eighteen years or upon marriage, such persons lose their status as dependents unless wholly dependent upon the deceased and incapable of self-support by reason of mental or physical disability. "Parents" includes step parents, parents-in-law, parents by adoption and persons *in loco parentis* for more than three years prior to the death of the deceased employee.

(4) Compensation for disability is paid to the employee as follows:

(a) Total disability either permanent or partial (loss of both hands, arms, feet, legs or eyes or any two of them, shall be permanent disability), 66⅔% of average weekly wage of the employee to be paid not exceeding 450 weeks and not to exceed a maximum of $8600, whichever is less, with a maximum of $25.00 per week and a minimum of $7.00 per week.

(b) Permanent partial disability, 66⅔% of average weekly wage to employee not to exceed the maximums below for the losses stated:

Member Lost	Number Weeks Compensation	Maximum Payable
Arm	200	$5000
Leg	175	4375
Hand	150	3750
Foot	125	3125
Eye	100	2500
Thumb	60	900
First finger	35	875
Second finger	30	750
Great toe	30	750
Third finger	20	500
Other toes	10	250
Fourth finger	15	375
One ear	40	1000
Both ears	150	3750

Permanent loss of use of a member is considered the same as loss thereof. There are other particular provisions as to less serious losses. Permanent partial disability for injuries not listed will be computed at 66⅔% of the difference in the average weekly wage before injury and the earning capacity after the injury in the same or other employment.

(5) In temporary partial disability resulting in loss of earning capacity, 66⅔% of difference in the average weekly wages before injury and his earning capacity after the injury in the same or some other employment.

(6) Among other particular provisions are the following benefits:

(a) Not exceeding $2000.00 may be awarded for facial or head disfigurement, in the discretion of the Commission, but not before one year after the injury.

(b) Under limited conditions, compensation for hernia may be awarded as temporary total disability not exceeding 26 weeks (being a maximum of $670.00) plus operating fee of $250.00. Such compensation is subject to particular conditions set forth in the Act.

(c) Benefits provided for vocational rehabilitation may be allowed as additional benefits by the Commission not exceeding $10.00 per week for 52 weeks.

It is not only important to know the provisions of the Mississippi Act but it is also important to compare the provisions of our Act with those in

existence in other states. While the working conditions, the standard of living, the many factors entering into the amount of benefits and type of recoveries allowed differ from state to state, nevertheless, workmen's compensation legislation has followed a general pattern and the Mississippi legislation falls within such pattern which has developed over a period of thirty-seven years. A general comparison reveals that our Act embodies most of the best provisions of the other acts and that many of the provisions which have proved unfair and undesirable in other states have been omitted. In order to give a general picture of the benefits provided by the Mississippi Act as compared to those provided by other states, there are attached hereto Schedules A, B, and C. Space does not permit a comparison with the benefits provided by all states, but as it seems to have been the general understanding throughout the State that the Mississippi Act is extremely liberal and it has been stated that it is the most liberal in the United States, there has been included in the schedules a comparison of the maximum benefits in death claims and the maximum weekly benefits in permanent disability cases in the laws of all states more liberal than that of Mississippi.

Authoritative compilations concerning the provisions of workmen's compensation laws in the United States are prepared periodically only, and therefore in comparing the Mississippi Workmen's Compensation Act with the acts in effect in other states it has been necessary to utilize data published on January 1, 1948, based upon the acts in effect as of July 1, 1947.[9] Numerous changes have been made in the several acts during the succeeding months, in most instances liberalizing the benefits provided in the several acts affected thereby. The most notable example is that of Louisiana in which there was a recent liberalization of most of the material benefits provided in the act, with the result that insurance rates under that Act increased 19.3%, a direct index of the liberality of the adopted changes. Benefits have been substantially increased in Massachusetts, the District of Columbia, Missouri, New York, and Kentucky since June 1, 1948.

Because of the numerous factors entering into the benefits received, it is impossible to make an exact comparison from which it can be arbitrarily said that the rank of the various acts as to liberality has been determined. However, general comparisons give a reasonably reliable idea of the comparison of the Mississippi Act with the other acts.

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[9] ANALYSIS OF PROVISIONS OF WORKMEN'S COMPENSATION LAWS AND DISCUSSION OF COVERAGES, Prepared by Insurance Dep't, Chamber of Commerce of U.S., Washington, D. C.; STATE WORKMEN'S COMPENSATION LAWS AS OF JUNE 1, 1946, BULL. 78, (U.S. Dep't. of Labor, 1946); and WORKMEN'S COMPENSATION LEGISLATION IN 1947, BULL. R. 1908, (U.S. Dep't. of Labor, 1948).

From Schedule A it will be noted that the maximum per cent of the average weekly wage allowable in Mississippi, while comparable with many other states, is the highest in the United States with the exception of Nevada and is slightly higher than any other Southern State. The amount received per week is governed by such per cent, subject, however, to a gross maximum of $25.00 per week. In other words, the injured employee will receive either 66⅔% of his average weekly wage for the 52 weeks preceding the date of the injury, or $25.00 per week, whichever is the lesser. There is also a minimum amount of $7.00 per week, and if 66⅔% of the amount of the average weekly wage would be less than $7.00 per week, the injured employee will nevertheless receive $7.00 per week. Schedule A is set up on the basis of the maximum total payment allowable under the law, but it appears that there are only nine states in which the weekly maximum exceeds $25.00 per week, and fifteen states in which the gross maximum payable in death claims exceeds $8600.00 or is without a stated maximum limit. Taking Alabama, Arkansas, Georgia, Florida, Louisiana, North Carolina, South Carolina, and Tennessee as comparable Southern States, it will be seen that the average maximum limit in death claims is $6,500.00, whereas the Mississippi limit is $8,600.00. In such case the average maximum weekly payment is $21.75, as compared to $25.00 for Mississippi. Turning to Schedule B it will be seen that a similar situation exists with reference to the maximum weekly benefits payable in total and permanent disability cases. Mississippi ranks fourteenth in the United States as to maximum limit and has a maximum limit of $8,600.00 (subject to certain possible additions), as compared to an average maximum limit in other states of approximately $6,000.00. The same maximum weekly payments apply. It will be noted, however, that the maximum period of weeks for which said disability payments may continue is 450 weeks in Mississippi and that this is comparable to the Southern average of 350 weeks.

From Schedule C it will be seen that the maximum benefits which may be paid for scheduled injuries resulting in partial permanent disability in Mississippi are comparable to North Carolina and South Carolina and largely to Florida, are less than those payable in Louisiana, and that such benefits in Arkansas, Tennessee, Georgia and Alabama are generally less than those in Mississippi.

In addition to the comparisons given in the schedules, it is interesting to note that in 31 states the death benefits are limited to payments for a specified period ranging from 260 to 600 weeks, some of these states having a maximum total, and some being without such maximum. In 16 states and also under the U. S. Act for Compensation to Civil Employees, life benefits are paid for permanent and total disability without limitation as to time or amount. The time periods range from 260 to 1,000 weeks, and the

money limitations from $5,000 to $16,200. There are numerous differences as to the effect of various subsidiary matters upon such payments.

It will be noted that full, unlimited medical aid is given in Mississippi and it appears that such aid will include artificial limbs and other appliances. This is true in eleven other states, and in fourteen additional states medical benefits are virtually unlimited because the administrative agency can extend such services indefinitely. In twenty-two states there are period or cost limitations or both, some of which are subject to variation by the administrative agency. In this case, also, Mississippi is among the most liberal in the United States.

On the whole the Mississippi Act is more liberal than that of any of the surrounding Southern States with the exception of Louisiana, but, if the benefits provided in the act are not increased within the next few years, it appears to be very probable that the acts of the surrounding Southern States will be amended from time to time and liberalized to the extent that they will be relatively comparable to the Mississippi Act. There is no question that the Act is very beneficial to employees and will result in a more complete and more satisfactory remedy for employees.

It has been the general concensus of opinion in Mississippi that an act of this kind would also be beneficial to the employer. However, upon the passage of this Act with its liberal benefits some question has arisen as to whether or not it might prove to be burdensome to employers because of the liberality of its provisions. The chief factor determining the desirability of such a law from the viewpoint of the employer is the financial burden which will result therefrom. In most instances this will be reflected by the premiums paid to the insurance carrier under the Workmen's Compensation Act as compared to premiums which have been paid to such carriers under employers' liability insurance. Not only is this true as to employers who have heretofore carried insurance, but the relation of the premiums charged directly reflects the loss ratio which may be expected, and therefore is an indication of the relative burden to self insurers as well as to employers who have actually carried insurance. As insurance rates are based upon many factors, including the experience which has been had in the employment involved, the preliminary rates which have been approved by the Insurance Commission will be subject to change from year to year as actual experience is had under the operation of this Act.

There are approximately 600 employer classifications utilized by insurance carriers under workmen's compensation insurance. The National Council on Workmen's Compensation is the filing agency for most of the carriers, and the rates which have been filed are based upon the rates in effect under the Arkansas Compensation Act, varied to take care of the

differences in the liberality of the Mississippi benefits as compared to those set up in Arkansas. The comparative factors differ in the various types of benefits, but the Mississippi rates have been calculated on a basis of law differentials which measure the theoretical differences between the two acts, resulting in an average differential of 16.1% more liberal benefits for Mississippi than Arkansas. Of course, this does not hold true as to each particular classification, since the type of employment affects the experience expected under workmen's compensation as compared to employers' liability. An average of the 600 classifications involved reveals that the rates under workmen's compensation generally will be approximately 7.77% less than the rates under employers' liability on a policy with a coverage of $5,000 for each individual injury or death and $10,000 for each accident. As compared to the employers' liability rates upon policies with a $10,000 and $20,000 limit, the workmen's compensation rates will be 19.8% less on a general average. In some instances, especially in connection with hazardous employments where there are a multitude of small accidents, the workmen's compensation rate will actually be higher than the rate under employers' liability and in many employments the rates will be more than 7.77% lower. Hence, each employer classification will have to stand on its own facts, the figures here mentioned being general averages only.

It is estimated that the average coverage in Mississippi had by employers under common law liability was on the basis of a $10,000 and $20,000 limit policy. Therefore, the Workmen's Compensation Act appears to be a definite saving for the employer and a distinct advantage to him. Not only will it be advantageous financially, but it also will tend to better employer-employee relations and has generally been regarded as providing an improvement in the attitude of the employee to his work. Not only will this saving be effected by the present rates, but under the Workmen's Compensation Act the coverage is unlimited and each employer will receive protection to the same extent as if he had carried employers' liability insurance with a maximum limit. As employers' liability insurance with a limit of $50,000 for each individual injury and $200,000 for each accident was 34% higher than the manual rate for $5,000 and $10,000 limit coverage, the actual saving to the employer as compared to the coverage provided is greater than that stated.

Honorable Jesse L. White, Insurance Commissioner, and the Mississippi Workmen's Compensation Commission were able to induce the National Council on Compensation Insurance to file a rating plan which recognizes employers' experience in employers' liability insurance and which will be utilized in determining individual rates under workmen's compensation insurance. The debit or credit developed under this plan is subject to

certain limitations. This is the first time in the history of adoption of workmen's compensation legislation that such a plan has been developed for the first year that such legislation was in effect. This will be of material benefit to many Mississippi employers. Of course, the entire rate structure is subject to revision from time to time as the Mississippi Act remains in effect and actual experience is had under it, but the initial rate structure is favorable as compared to the rate structure under employers' liability insurance.

No complete and official compilation has been made of a comparison of the average rates in Mississippi to the rates in adjoining states under their individual workmen's compensation legislation. However, a partial comparison indicates that the present Louisiana rates vary in the various classifications from 5% to 20% higher than the Mississippi rates; the Alabama rates are from 15% to 30% lower than the Mississippi rates; the Tennessee rates are from 10% to 25% lower than the Mississippi rates; and the Mississippi rates are from 10% to 20% higher than the Arkansas rates. Such rates vary according to the industrial and business experience in employment in each state, but generally speaking the differences are an index of the liberality of the respective laws as to benefits payable to the employee.

It appears probable that most employers with a sufficiently large pay roll to warrant the carrying of insurance will elect to come under the Workmen's Compensation Act rather than to remain under the common law employers' liability. This has been the experience in most other states and we may expect such result to come gradually in Mississippi.

Of especial interest to Mississippi lawyers are the provisions for the administration of the Act. There is no question that this legislation will materially affect adversely the practice of law, both for those attorneys who have represented the plaintiff in personal injury actions and those attorneys who have represented the employers and insurance companies in the defense of such actions. This result will stem not only from the nature of the rights created by the Act but also from the method of enforcement set up by the Mississippi Act. There are only five states in which all matters arising in the administration of workmen's compensation legislation are administered in the courts. These are Alabama, Louisiana, New Mexico, Tennessee and Wyoming. In all of the other states and in the federal acts the rights of the parties arising thereunder are handled by various administrative bodies, some being under general boards, but the great majority being under special boards set up solely for this purpose. The actions of these administrative tribunals are subject to review by the courts in each state, but the extent of review varies materially. The payment of attorneys' fees is regulated in many states by the statute itself, varying from 10% to

35%, but the majority of the acts provide that attorneys' fees shall be subject to the discretion of the commission, but payable out of the award to the employee.

The administration of the Mississippi Act has been placed in a Workmen's Compensation Commission composed of three members appointed by the Governor. The courts will not be called upon to administer the Act except to the extent that appeals may be taken to such courts from actions by the Commission. Mr. Walter Dell Davis has been appointed Chairman of the Commission, and he is recognized as a lawyer and businessman of ability and integrity. We may assume that other appointments by the Governor will also be men of this caliber. This is of great importance to all parties involved, as the success of such legislation depends largely upon its administration which will establish the basis of operation probably to be followed over a long period of years.

The great majority of benefits which arise under the Workmen's Compensation Act will be handled without the intervention of the Commission or the utilization of the services of an attorney. Although notice to the Commission is required in each case of the commencement of compensation payments and of the completion thereof, where no controversy arises, this is the only material connection the Commission will have with the payment of benefits. Such benefits will be paid in semi-monthly installments directly by the employer or his insurer to the injured employee. In practice the claim department of the insurer will handle all such details in cooperation with the employer and will handle the necessary notices to the Commission and other formal procedure required.

A brief outline of the procedural details is as follows:

(1) Actual notice to the employer of the injury is required within thirty days after the occurrence of it, subject to the provision that lack of such notice shall not bar recovery if it is found that the employer had knowledge of the injury and was not prejudiced by the employee's failure to give notice. However, there is an absolute limitation of two years if application for benefits is not filed with the Commission within such period. The two year limitation is subject to a saving, to a mental incompetent or a minor, of the same length of time after the removal of such disability where no guardian has been appointed, but it is applicable if a guardian is appointed for such incompetent or minor.

(2) The first installment of compensation is due on the fourteenth day after the employer has received notice of the injury or death, but no compensation is allowed for the first five days of the disability, other than medical benefits, unless the injury results in a disability of fourteen days

or more, in which case the compensation is allowed from the date of the disability.

(3) If there is no controversy, notice is given by the employer to the Commission upon making the first payment and upon the suspension of payment or completion of payment. If there is a controversy the employer is required to file a notice with the Commission of such controversy on or before the fourteenth day after he has knowledge of the alleged injury or death, giving the facts generally and the basis of controversy. However, failure to file this notice does not prevent the employer from raising any defense where a claim is subsequently filed by the employee nor shall the filing of the notice preclude the employer from raising any additional defense thereafter.

(4) When a controversy arises either by filing of notice by the employer of the existence of such controversy or the filing of a claim with the Commission by the employee and a response by the employer raising a controversy, further proceedings will be had in accordance with rules and regulations to be determined by the Commission. Broadly, however, it appears that reasonable notice will be given to the parties to the controversy and a hearing will be set before a commissioner or a duly authorized representative of the Commission. Such hearings will be held in the county where the injury occurred unless otherwise ordered by the Commission. Upon the conclusion of such hearing the commissioner or the representative will make or deny an award and will file the decision in the office of the Commission whereupon immediate notice of such decision will be sent to all interested parties.

(5) Such award will become final unless within twenty days a request or petition for review by the full Commission is filed with the Commission. Upon the filing of such request the Commission will set a date for a hearing before the full Commission and give reasonable notice to all parties. The law is not complete in the provisions governing procedure, but it appears that at such hearing before the full Commission the record of all testimony and proceedings had before the commissioner or adjudicator will be presented and that the parties will then have an opportunity to present any additional evidence which may be deemed proper. It is particularly provided that the Commission shall not be governed by the technical rules of common law or statutory rules of evidence and procedure and that the declaration of a deceased employee concerning the injury, in respect of which the investigation or inquiry is being made, shall be received in evidence, and, if corroborated by other evidence, be sufficient to establish the injury.

(6) A stenographic record will be kept of the proceedings before the Commission, and upon the award by such Commission either party shall have thirty days from the date of the filing of it in the office of the Commission and notification to the parties to appeal therefrom to the circuit court of the county where the injury occurred.

(7) An appeal to the circuit court of the county in which the injury occurred is perfected by the filing of notice of appeal with the Commission and thereupon the Commission transmits the entire record, including the transcript of the evidence to such court. The appeal is considered only upon the record by the circuit judge without a jury in term time or in vacation. The Act provides that: "The circuit court shall review all questions of law and of fact. If no prejudicial error be found, the matter shall be affirmed and remanded to the Commission for enforcement. If prejudicial error be found, the same shall be reversed and the circuit court shall enter such judgment or award as the Commission should have entered." There is no provision for the circuit court to take any additional evidence which might be desirable under certain circumstances nor for a reversal for the taking of further testimony by the Commission. However, such matters will have to be determined by the Commission under the supervision of the courts.

(8) Provision is made for appeal to the Supreme Court in the manner now required by law as to other matters with the right to a supersedeas if granted by the court, and upon such terms as the court may direct.

There are numerous general provisions giving the Commission authority to issue subpoenas, compel the attendance and testimony of witnesses, the production of books and documents, etc. There are also provisions for review of awards and further investigation concerning developments as to physical condition, etc., which are beyond the scope of this article.

In closing this brief review of a field of law strange to us as practicing attorneys in Mississippi, it may be well to observe numerous matters as to which it appears that controversies may arise. For a number of years there will be numerous questions which the courts will have to determine affecting the rights of employees and the liabilities of the employers and their insurance carriers. The services of attorneys will be needed in such matters, which will probably include the following, to-wit:

(1) Whether or not the injury or death arose out of and in the course of the employment.

(2) The extent of the disability resulting from the injury, its effect upon the earning capacity of the injured party where the injury is not one of those for which specific provision is made in the Act, and the extent to

which any previous disability existing may have contributed to the disability.

(3) Whether the injury was caused by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.

(4) Whether the employer was actually covered by the Act or fell within one of the exempted classifications.

(5) In death cases the status of a claimant as a dependent and relative, the effect of remarriage and the inability in certain cases of the claimant to support himself by reason of mental or physical disability.

(6) The allocation of the benefits in accordance with the percentages set forth in the Act between persons within the various classifications of dependents and between separate classifications of dependents. The question of priority between dependents may frequently arise.

(7) The redistribution of benefits upon the death of a claimant, and the extent to which the right to receive benefits may survive the death of the employee or of a claimant.

(8) The continuance of disability where the award is upon the basis of temporary disability and the continued existence of disability where the award is upon the basis of a total disability not resulting from a loss particularly named in the statute.

(9) Claims for facial disfigurement and for rehabilitation and contest as to the amount of medical and hospital expenses allowable by the Commission.

(10) Whether the disability or death resulted from an injury as defined in the Act or from an occupational disease. There is a fine dividing line between an injury and a disease in some of the cases arising concerning occupational disability not due to what is commonly known as an accident.

(11) Questions involving the effect upon the right to recover after failure to comply with the technical provisions of the Act as to notice, procedure, etc.

(12) The determination of the average weekly wage as defined in the Act, and the application of the various maximums and minimums therein provided.

It would be interesting to note the lines of authority which have developed in construing various provisions of acts similar to the Mississippi statute, but the scope of this article will not permit such a discussion. As-

suming the soundness of the principle of this social legislation which appears to have been satisfactorily enforced in the other states, we are safe in reaching the conclusion that both the employers and employees will be materially benefited by this legislation. The psychological effect upon industries coming into Mississippi is good, and it appears that the employers on the average will reap a financial saving and the employees a financial benefit. On the whole the Act is fair and workable, and compares favorably with the statutes now in existence in the other states.

SCHEDULE A

MAXIMUM WEEKLY BENEFITS IN DEATH CLAIMS

State	Rank	Maximum Per Cent Widow & Children	Weekly Payments Minimum	Weekly Payments Maximum	Maximum Period in Weeks	Maximum Total
Rhode Island	1	66⅔	7.48	20.00	600	$12,000.00
Wyoming	2	?	16.15	20.77	No Limit	11,000.00
Michigan	3	66⅔	8.00	27.00	400	10,800.00
Montana	4	66⅔	10.00	23.50	400	9,400.00
Texas	5	60	9.00	25.00	360	9,000.00
Arizona	6	66⅔	None	None	Widowhood	None
Connecticut	7	50	9.00	32.00	312	9,984.00 (widow)
Missouri	8	66⅔	6.00	20.00	No Limit	No Limit
Nevada	9	80	None	27.69	No Limit	No Limit
New York	10	66⅔	5.40	28.00	None	No Limit
North Dakota	11	66⅔	8.75	23.33	None	None
Oregon	12	DK	13.84	31.61	None	None
Washington	13	DK	17.38	DK	None	None
West Virginia	14	DK	6.92	DK	None	None
Louisiana	15	65	10.00	30.00	300	9,000.00
Mississippi	16	66⅔	7.00	25.00	450	8,600.00*
Alabama	36	65	5.00	18.00	300	6,000.00
Arkansas	27	65	7.00	20.00	450	7,000.00
Georgia	39	?	?	17.00	300	5.100.00
Florida	42	60	8.00	22.00	350	5,000.00
North Carolina	34	60	8.00	24.00	350	6.000.00
South Carolina	33	60	5.00	25.00	350	6 000.00
Tennessee	30	60	7.00	20.00	400	6.500.00

*Plus funeral and $100.00 lump sum to widow = $9,050.00.

SCHEDULE B

MAXIMUM WEEKLY BENEFITS IN PERMANENT DISABILITY CASES

State	Rank	Per Cent Wages	Maximum Period (Weeks)	Minimum Weekly Payment	Maximum Weekly Payment	Maximum Total Payment
Connecticut	1	50	520	9.00	30.00	$16,200.00
Michigan	2	66⅔	750	10.00	21.00	15,750.00
New Mexico	3	60	550	12.00	22.00	12,100.00
Rhode Island	4	60	1,000	12.00	20.00	12,000.00
Louisiana	5	65	400	3.00	30.00	12,000.00
Montana	6	66⅔	500	10.50	23.50	11,750.00
Wyoming	7	DK	DK	12.69	DK	12,650.00* or 6,600.00**
Delaware	8	60	500	8.00	21.00	10,500.00
Oklahoma	9	66⅔	500	10.00	21.00	10,500.00
Pennsylvania	10	66⅔	500	10.00	20.00	10,000.00
Texas	11	60	401	9.00	25.00	10,025.00
Minnesota	12	66⅔	None	13.50	27.00	10,000,00
Kentucky	13	65	520	5.00	18.00	9,000.00
Mississippi	14	66⅔	450	7.00	25.00	8,600.00***
Alabama		65	550	5.00	18.00	6,000.00
Arkansas		65	450	7.00	20.00	7,000.00
Florida		60	350	8.00	22.00	5.000.00
Georgia		50	350	4.00	20.00	7,000.00
North Carolina		60	400	8.00	24.00	6,000.00
South Carolina		60	500	5.00	25.00	6,000.00
Tennessee		60	550	8.00	20.00	6,500.00
Colorado		50	Life	7.00	17.50	5,475.00
Vermont		50	260	10.00	20.00	5,200.00

*This is U. S. Chamber of Commerce figure.
**This is a U. S. Dept. of Labor figure.
***Vocational Benefits to $520.00.
***Facial Disfigurement Benefits to $2,000.00.

SCHEDULE C

WORKMEN'S COMPENSATION

MAXIMUM AMOUNTS WHICH COULD BE PAID IN DOLLARS FOR SCHEDULED INJURIES

STATE	ARM AT SHOULDER	HAND	THUMB	FIRST FINGER	SECOND FINGER	THIRD FINGER	FOURTH FINGER	LEG AT HIP	FOOT	GREAT TOE	OTHER TOES	ONE EYE	HEARING ONE EAR	HEARING TWO EARS
Louisiana**	6,000	4,500	1,500	900	600	600	600	5,250	3,750	600	300	3,000	-----	-----
N. Carolina	5,280	4,080	1,560	960	840	528	384	4,800	3,456	840	240	2,880	1,680	3,600
Mississippi	5,000	3,750	900	875	750	600	375	4,375	3,125	750	250	2,500	1,000	3,750*
S. Carolina	5,000	3,750	1,500	875	750	500	375	4,375	3,125	750	250	2,500	1,750	3,750
Florida	4,400	3,850	1,320	770	660	440	330	4,400	3,850	660	220	3,850	880	3,300
Arkansas	4,000	3,000	1,200	700	600	400	300	3,500	2,500	600	200	2,000	800	3,000
Tennessee	4,000	3,000	1,200	720	600	400	300	3,500	2,500	600	200	2,000	-----	3,000
Georgia	4,000	3,000	1,200	700	600	400	300	3,500	2,500	600	200	2,000	-----	3,000
Alabama**	3,600	2,700	1,080	810	540	360	270	3,150	2,250	540	180	1,800	-----	2,700

*Mississippi is the eighteenth state nationally in the general amount of benefits provided under these coverages. Alabama is the forty-second state.

**In these states compensation for temporary disability is deducted from the allowance for permanent partial disability. In all others listed, it is in addition thereto.

THE NEW MISSISSIPPI OIL AND GAS CONSERVATION ACT

*Irwin W. Coleman**

One of the outstanding accomplishments of the 1948 Legislature of Mississippi was the passage of House Bill 80, known as the "Oil and Gas Conservation Act." It is an Act of which the State may be proud, and is generally considered adequate to accomplish the objectives for which it was passed. The farsightedness and tireless efforts of the men who drafted the legislation, of those who fostered its passage, of the Governor in putting his influence and support behind it, of the Conservation Committees of both houses, and of the lawmakers themselves who finally put the law on the statute books, have been ably rewarded by the realization of a Conservation Act which will foster the orderly and adequate search for and production and utilization of the oil and gas resources of the State. Particular recognition should be given to the untiring work of Senator Stanton Hall and Representative Icey Day, Chairmen, respectively, of the Senate and House Committees on Conservation.

No one could give the answers or solutions to all of the problems that have arisen or that will arise under this new legislation. The subject is a large and interesting one. What this law is and what it means and what it will mean are questions that history and experience alone can finally answer. However, it might be worthwhile to consider the factors that have gone to make the passage of an integrated conservation law desirable, the salient features of the Act itself, and what we have a right to expect the law and its administration to accomplish.

Oil and gas are minerals—a part of the earth—and as such are capable of ownership as are other parts of the soil and matter going to make up the crust of the earth. One might well ask the question why we need special legislation dealing with private property. The answer becomes obvious when we consider that oil and gas and other minerals are component parts of the vast resources of this great State. They are irreplaceable assets. When they have been taken from the bowels of the earth, placed in commerce, treated, refined, distributed and finally used for the many varied and useful purposes that science has devised for them, that much of the natural resources of the State is gone forever. Man has not found a way whereby he can replace the oil and gas that is taken from the earth. This is not a crop that can be planted and harvested and replanted and reharvested with the changing of the seasons of the years. These resources cannot be replaced as our forests are being replaced through modern re-

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forestation methods. Therefore, even though these minerals may belong to a relatively few "owners," it is of vital importance to all the people of the State that these resources not be wasted, but that they be conserved so that each and every citizen may be bettered and enriched through the proper utilization of them. Of course, in so doing, the rights of those who own these minerals cannot be infringed. They are entitled to the benefits flowing to them by reason of such ownership. Sometimes the desire of the owner of the minerals to enrich himself quickly clashes with the right of the public generally to be benefited by the riches within the State. It is for the purpose of keeping these matters in balance that the State, in the exercise of its police powers, must step in and protect the one against the other.

Factors Which Made Passage of Conservation Legislation Needful and Desirable

You will note that the subject of this article is "The *New* Mississippi Oil and Gas Conservation Law." Some might jump to the conclusion that Mississippi did not have any conservation legislation until this law was passed. This is not the case. As early as 1932 the Mississippi Legislature passed its first conservation law.[1] That law set up the Oil and Gas Board, and had many provisions designed for the conservation of oil and gas and the prevention of waste. At the time that that law was enacted there were no producing wells in the state. Gas had only recently been discovered just outside the city of Jackson. The law was amended in 1934,[2] 1936,[3] 1944,[4] and 1946,[5] but with the exception of the 1936 amendment no real change was made in it. It was not until 1939 that oil was discovered in the State, and since that time the industry has grown from the discovery well in 1939 to over 1000 producing oil wells and vast gas reserves today. Since the passage of the 1932 conservation law, producing methods have undergone radical changes. What were considered conservative practices at that time are in many instances now recognized as wasteful. Much law has been written by our courts defining and redefining the nature of property rights in oil and gas, clarifying the correlative rights of owners, and construing the rights and powers of the state to pass and administer laws dealing with the protection of the rights of the public generally. If there were no other reason, it was essential for our lawmakers to consider this fifteen years of development in the industry and the changed conditions in the state, and to bring its conservation law up with the times. There were several definite limitations of the former conservation law which made it

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[1]Miss. Laws 1932, c. 117, p. 315.
[2]Miss. Laws 1934, c. 154.
[3]Miss. Laws 1936, c. 305, p. 583.
[4]Miss. Laws 1944, c. 233, p. 404.
[5]Miss. Laws 1946, c. 345, p. 542; c. 450, p. 728.

difficult, and sometimes impossible, for its purposes to be realized. Some of these limitations were:

(1) The Oil and Gas Board was composed of the Governor, Land Commissioner, Attorney General, and the Supervisor. The State has been fortunate that the men occupying these positions have been competent, conscientious and filled with an indefatigable desire to discharge the duties placed upon them. However, the constitutional duties of the offices to which these men have been elected have always been so great that it has been well nigh impossible for them to give the time, study, consideration and effort to the administration of this particular branch of industry that those men would have liked to give and which the problems in recent years have made mandatory. This is not a criticism of them. They have rendered valuable and uncompromising service. The industry recognizes this and is grateful to them.

(2) There was not adequate provision made for financing the work of the Board. The Act provided for only one full-time man, the Supervisor, and there has been no appropriation sufficient to finance his office and to provide the necessary personnel for the adequate carrying on of the work. By a separate Act in 1932[6] a fee of $25.00 was provided for a permit to drill a well. It is from these fees that our old Oil and Gas Board and its activities have been financed in the main.

(3) The necessary personnel has not been provided to administer the Act. While penalties were provided for its violation, there was no one, other than the Supervisor, charged with the duty of enforcing the Act.

These three limitations on our prior law were summed up by Governor Fielding L. Wright in his message to the 1948 Legislature, when he said:

> Each of us [members of the old Board] has all he can do to fulfill the constitutional duties of his respective office.
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> * * * Membership in a Board which regulates an industry so important to the welfare of Mississippi and Mississippians is a full-time job. I urge that you set up such a Board adequately financed and staffed to competently execute its duties; it must have at its disposal competent engineers so it would not be dependent on the industry for information necessary for regulations formulated in the public interest.

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[6]Miss. Laws 1932, c. 129, p. 389.

A Discussion of the Act

With the above background in mind, let us now examine the Statute as passed by the Legislature and see if these prime objectives have been realized in the finished product. The Act itself is rather long and consists of twenty-two printed pages. No attempt will be made here to set out the entire Act, but a general outline of its main provisions will be presented, with more emphasis on the portions which are considered to be of greatest importance.

The objectives sought to be reached by this Act and a general statement of the policy of the Legislature are set forth in the first two paragraphs. While these paragraphs technically might not be considered as an integral part of the law, yet undoubtedly, the Oil and Gas Board and the courts will look to these general statements in order to ascertain that elusive concept generally referred to as the "intention of the Legislature." These two paragraphs read:

> Section 1. Declaration of Policy. It is hereby declared to be in the public interest to foster, encourage and promote the development, production and utilization of the natural resources of oil and gas in the State of Mississippi; and to protect the public and private interests against the evils of waste in the production and utilization of oil and gas, by prohibiting waste as herein defined; to safe-guard, protect and enforce the co-equal and correlative rights of owners in a common source or pool of oil and gas to the end that each owner in a common pool or source of supply of oil and gas may obtain his just and equitable share of production therefrom; and to obtain, as soon as practicable, consistent with the prohibition of waste, the full development by progressive drilling of other wells in all producing pools of oil and gas or of all pools which may hereafter be brought into production of such, within the State, until such pool is fully defined.
>
> It is not the intent nor the purpose of this law to require or permit the proration or distribution of the production of oil and gas among the fields and pools of Mississippi, on the basis of market demand. It is the intent and purpose of this law to permit each and every oil and gas pool in Mississippi to be produced up to its maximum efficient rate of production, subject to the prohibition of waste as herein defined, and subject further to the enforcement and protection of the co-equal and correlative rights of the owners of a common source of oil and gas, so that each common owner may obtain his just and equitable share of production therefrom.

Section 2 of the Act creates the State Oil and Gas Board, to be composed of five members, one appointed by the Lieutenant Governor, one appointed by the Attorney General and three appointed by the Governor. This Board is not a full time Board. The Statute provides that each member of the Board shall receive compensation in addition to his reasonable traveling expenses in the amount of $20.00 per diem for not to exceed 120 days per year; provided, however, that the Governor, at his discretion, may allow an additional forty days. If the necessity arises, the members of the Board, of course, will not be deterred from putting in more time for the mere reason that they will receive no compensation for it.

Under the provisions of this Section the officers charged therewith have appointed a most excellent Board. The members of this Board are as follows: James McClure of Sardis, Mississippi, Chairman; W. C. Leonard of Kosciusko, Mississippi, Vice-Chairman; Hugh White of Columbia, Mississippi; William Maynard of Clarksdale, Mississippi; and Walter Johnson, Jr., of Jackson, Mississippi.

Section 3 of the Act deals with the personnel to be employed by the Board to assist it in the discharge of its duties. The Supervisor is to be employed by the Board and his salary fixed by the Board. He is to be a full time employee and under bond. As Supervisor, he is charged with the duties of enforcing the Act and all rules, regulations and orders promulgated by the Board. He also collects and remits to the State Treasurer all funds received by the Board. The newly constituted Board very wisely saw fit to appoint to this position H. M. Morse, who has been Supervisor of the State Oil and Gas Board for the past ten years.

The Act provides that the Supervisor, with the concurrence of the Board, shall employ all personnel necessary to carry out the provisions of the Act, and that their compensation shall be fixed by the Board.

The Attorney General of Mississippi is by the Act made the attorney for the Board, but provision is made for the employment of additional counsel where necessary.

Section 4 of the Act deals with definitions of terms used throughout the Act, only one of which shall be here noticed. In this Section "waste" is defined as meaning and including the following:

(1) Inefficient and improper dissipation of reservoir energy.

(2) The inefficient storing of oil.

(3) The abuse of the correlative rights and opportunities of each owner in the field.

(4) Production methods resulting in unnecessary channeling of water or gas.

(5) Operation of wells with an inefficient gas-oil ratio.

(6) The drowning of a producing stratum with water.

(7) The creation of fire hazards.

(8) Allowing gas to escape into the air unnecessarily.

(9) The use of gas for the manufacture of carbon black, except where there is no other market for the gas.

"Waste" as defined is by the Act made unlawful.

Section 6 of the Act establishes the jurisdiction, powers and authority of the Oil and Gas Board. This is one of the most important portions of the Act, and will merit the closest consideration.

In the first place, the Board is given the authority and charged with the duty of making inquiries, investigations and inspections in order to determine whether or not "waste" as defined in the Act is being committed or threatened. To this end it is given authority to collect data; to examine property, leases, papers, books, and records; to check, test, and gauge oil and gas wells, tanks, refineries and transportation; to hold hearings; to require the keeping of records and making of reports; and to take such action that may be reasonably necessary to enforce this Act. This provision alone calls for a great deal of work on the part of the Board, and in order for it to be done effectively it will, of course, be necessary that the Board employ adequate and efficient personnel.

The Board is given the authority and charged with the duty of making, after notice and hearing, rules, regulations and orders for the purpose of carrying out the provisions of the Act. Many of such purposes are set out in the Act, but their enumeration does not limit the Board to the particular purposes stated. These purposes as set out follow in general the definition of "waste" referred to above, but some of these purposes go a little farther than that, and will merit particular consideration. These are:

(1) To regulate the spacing of wells and to establish drilling units.

(2) To set allowables for any pool or field for the prevention of "waste," and to apportion or allocate such allowables to the wells within the pools or fields on a fair and equitable basis. In this connection, the production from a discovery well is not to be restricted until cost of drilling the well has been recovered.

Undoubtedly, the Board will give a great deal of its time to the matters referred to in the above two provisions.

Section 7 gives the Board authority to prescribe its own rules of procedure, and generally sets out the manner in which hearings before the Board may be instituted, how notices are to be given, and how the minutes and records of the Board shall be kept. Perhaps the most important provision in this section is that dealing with notice. It is provided that no rule, regulation or order shall be made by the Board, in the absence of an emergency, except after a public hearing upon at least ten days notice, which notice may be given by publication in a newspaper of general circulation in the State and also in a newspaper of general circulation in the county or counties in which pools are located. It is provided that the Board may give notice by personal service, but it is not required to do so.

Section 8 specifically gives the Board and its representatives and employees authority and power to gather and require the production of the information, reports, etc. necessary for it to accumulate the data necessary to carry out the provisions of the Act. The Board is given the authority to require the attendance of witnesses and the production of books, papers and records.

Section 9 presents an elaboration on perhaps the two most important purposes for which the Board is authorized to promulgate orders. These are well spacing and regulation of production. The Board is given the authority, after notice and hearing, to establish drilling units, that is, the number of acres which one well in the particular pool will effectively drain. The drilling unit having been established, it is given authority to regulate the location of the well on the unit. In order to take care of exceptional circumstances, the Board is given authority to grant exceptions to the drilling and spacing pattern. These exceptional circumstances are stated to be "that the unit is partly outside the pool, or, for some other reason, a well so located on the unit would be non-productive, or topographical conditions are such as to make the drilling at such location unduly burdensome." This section also contains what might be termed a limitation on the powers of the Board to regulate production:

> (d) Anything herein contained to the contrary, notwithstanding, any allocation or apportionment of production shall be made on the basis of and in proportion to the acreage content of the drilling units prescribed for the producing horizons for the pool, so that each such prescribed unit shall have equal opportunity to produce the same daily allowable, and any special unit of less acreage shall be allowed to produce only in the proportion that the acreage content of any such special unit bears to the acreage content of the regular prescribed unit; provided, however, that in the event any well in attempting to make its allowable should be op-

> erated in a way that would commit waste as herein defined, or to the detriment of the field as a whole, the allowable for any such well shall be subject to adjustment.

This particular provision was inserted in the Act by amendment and might have been improperly placed there. I say this because Section 9 deals specifically with drilling units and spacing patterns. The regulation of production is provided for in Section 11 of the Act. It will be for the courts finally to say whether or not paragraph "d" of Section 9 is a limitation on the provisions of Section 11.

Section 10 deals generally with unitization. It recognizes the validity of voluntary contracts whereby unitization is effected so as to provide a drilling unit. It also provides that where the owners within an established drilling unit cannot voluntarily agree to integrate their interests, the Board may require them to do so as to a drilling unit of 40 acres or less, but not as to a drilling unit consisting of more than 40 acres. This particular provision has already been brought to the attention of the Board for construction.[7]

A provision is brought forward in this section from the old Act[8] to the effect that agreements made in the interest of conservation shall not be considered as in violation of the anti-trust laws.

Section 11 of the Act authorizes the Board to apportion a field allowable among the producers in the field where the allowable for the field has been fixed by the Board at an amount less than that which the field is capable of producing.

Section 12 provides for an appeal from any order of the Board to the Circuit Court of the First District of Hinds County, or to the Circuit Court of the county in which all or part of appellant's property affected by such order is situated. It is to be noted that this right of appeal is granted "in addition to other remedies now available." The appeal is to be taken and perfected within thirty days from the date of the order appealed from. The Act provides for the filing with the Board of a petition for appeal accompanied by an appeal bond in the amount of $500.00. Within 60 days after the approval of the appeal bond, the Board shall file with the Clerk of the Circuit Court to which the appeal is taken, a copy of the petition for appeal and of the rule, regulation or order appealed from, and a transcript of the record of the pleadings and evidences before the Board. The statute provides that the appeal can be heard and determined by the Circuit Court

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[7]Miss. State Oil and Gas Board Docket No. 8-48-11, Petition of Toxey Hall. Hearing held on November 18, 1948.

[8]*Cf.* MISS. CODE ANN. § 6172 (1942).

either in term time or in vacation "on the record, including a transcript of pleadings and testimony, both oral and documentary, filed and heard before the Board." It will be noted that this is a departure from the old statute[9] which undertook to provide for a trial de novo on appeal. But that provision for a trial de novo was held unconstitutional, as violating the separation of powers clause, in a recent case.[10] Appeals, both in the Circuit Court and in the Supreme Court, are to be heard and disposed of as preference causes.

Section 13 provides for the bringing of a suit against one threatening to violate or who is violating the Act or any rule, order or regulation thereunder. The suit is to be brought by the Board, but if the Board fails or refuses to bring suit for ten days, after having been requested in writing to do so, then any person or party in interest who is adversely affected by such violation is empowered to bring the suit.

Section 15 provides the penalties for violation of the Act or any valid orders issued under it. These penalties amount to $500.00 a day for each and every day of violation.

Section 16 provides for the issuance of permits for drilling wells for oil and gas, and Section 17 provides for a certificate of compliance from the Oil and Gas Board before a well can be connected to a pipeline.

Section 18 makes illegal the sale, purchase, transportation, refining or handling in any way of illegal oil or gas, that is, oil or gas produced in violation of the Act or regulations promulgated under it.

Section 19 provides for the seizure and sale on behalf of the State of any illegal oil or gas.

By Section 21 of the Act, the former conservation laws of the State are repealed. But the rules and regulations of the former Oil and Gas Board are continued in effect for six months unless sooner amended, rescinded or repealed.

What We Have Reason to Expect From The Administration Of the New Law

Someone has said that progress comes not from the enactment of new laws, but from the proper administration of law. This is certainly a true statement. The enactment of a sound and workable conservation law is now a *fait accompli*. The question now arises as how the law will be administered, and if the purposes for which it was passed will be realized.

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[9]Miss. Code Ann. § 6136 (1942).

[10]California Co. v. State Oil and Gas Board, 200 Miss. 824, 27 So.2d 542 (1946), *sugg. of error overruled*, 200 Miss. 849, 28 So.2d 210 (1946).

Those who have kept in touch with what has already been done under the law have no doubt of its sound and efficient administration. A Board has been appointed and is in operation which has shown itself devoted to an earnest and honest endeavor to administer the law forcefully and fully. The members of the Board have devoted a great amount of time and effort in acquainting themselves with the law itself, with the problems of the industry, and to a study of the best methods of coping with those problems within the framework of this law.

In addition to conducting several hearings[11] on matters brought before it for decision, the Board has held hearings and adopted a complete new set of rules of statewide application[12] and special rules for the Gwinville,[13] Heidelberg[14] and Tinsley[15] fields.

It is now adequately financed—and without cost to the taxpayers. There is levied a charge of two mills on each barrel of oil produced and one-tenth of a mill on each thousand cubic feet of gas produced.[16] The $25.00 permit fee has also been retained.[17] For the first six months of operation these sources have yielded in excess of $40,000. Certainly, with this kind of income the Board can and undoubtedly will provide itself with adequate and efficient personnel so that the objectives of the Act can be fully realized.

We have every reason to believe that Mississippi will go forward under this Act and its administration and will take its rightful place as one of the outstanding oil producing states in the nation.

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[11]Miss. State Oil and Gas Board Docket No. 1-48-9, Petition of United Gas Pipeline Co. for amendment to Gwinville Rules. Hearing held on June 21, 1948. Docket No. 2-48-11, Petition of Gulf Refining Co. for authority to install and operate a salt water disposal system in the Baxterville Field. Hearing held on August 16, 1948. Docket No. 3-48-9, Petition of Gulf Refining Co. for clarification of Order No. 2-48. Hearing held on October 21, 1948. Docket No. 8-48-11, *supra* note 7. Docket No. 9-48-15, Petition of Union Producing Co. for authority to complete a well as a gas well. Hearing held on November 10, 1948. Docket No. 10-48-7, Petition of T. F. Hodge for a permit to drill a well as an exception to the spacing rules. Hearing held on November 18,1948.

[12]Miss. State Oil and Gas Board Docket No. 4-48. Hearing held on October 22, 1948. Rules adopted on October 29, 1948.

[13]Miss. State Oil and Gas Board Docket No. 6-48-9. Hearing held on October 22, 1948. Rules adopted on October 29, 1948.

[14]Miss. State Oil and Gas Board Docket No. 5-48-8. Hearing held on October 22, 1948. Rules adopted on October 29, 1948.

[15]Miss. State Oil and Gas Board Docket No. 7-48-1. Hearing held on October 22, 1948. Rules adopted on October 29, 1948.

[16]Advance Sheet 12, General Acts of Miss. 1948, S.B. No. 574, p. 6; State Oil and Gas Board Order No. 1-48 dated May 12, 1948.

[17]Advance Sheet 7, General Acts of Miss. 1948, H.B. No. 1073, p. 36.

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FEDERAL ADMINISTRATIVE PROCEDURE ACT OF 1946

When the Administrative Procedure Act of 1946[1] became law it was the first tangible result of much long study and work by a committee appointed by the Attorney General to investigate the need for procedural reform in the administrative agencies of our Government. The Act did not embody all of the suggestions of the committee, as submitted in their report,[2] but it does seem to evidence an honest effort on the part of Congress to control the many agencies it has fostered over the years.

Though most Americans think that the plague of bureaucracy and administrative law has burst upon us in comparatively recent times, the fact is that the very first session of our First Congress enacted three statutes which conferred important administrative powers. Two of these[3] were the antecedents of statutes now administered by the Bureau of Customs in the Treasury Department, and the third[4] was the first of the long series of pension laws now handled by the Veterans' Administration. The Supreme Court of the United States added impetus to the movement when, in *Munn v. Illinois*,[5] it validated an Illinois statute which fixed rates to be charged by businesses "affected with a public interest." The Court thus having said that legislatures have the power to control such rates, the next step was to establish the right of the legislature to delegate power to agencies, and then the machinery became available for today's myriad of agencies.[6]

Due to the haphazard and intermittent manner in which the various agencies were set up by Congress over the years, there was no uniformity of procedure or regulation governing the many separate bodies which were attempting to administer the law. These shortcomings resulted in severe criticism of the government. The principal faults found with the maze of agencies[7] have been summarized as follows:

1. The administrative process is essentially dangerous in that it ignores the traditional American theory of separation of powers, a principal protection against tyranny and dictatorship in the United States.

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[1]5 U.S.C. § § 1001-1011.

[2]REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, Sen. Doc. No. 8, 77th Cong., 1st Sess. (1941).

[3]Act of July 31, 1789, 1 STAT. 29 (1st Cong., 1st Sess.); Act of September 1, 1789, 1 STAT. 55 (1st Cong., 1st Sess.).

[4]Act of September 29, 1789, 1 STAT. 95 (1st Cong., 1st Sess.).

[5]94 U.S. 113 (1876).

[6]Origins of many of the Federal Administrative Agencies may be found in the REP. ATT'Y. GEN. COMM. AD. PROC. 276 (1941).

[7]Note, 41 AM. POL. SCI. REV. 271 (1947).

2. The administrative process is frequently unfair since it permits the functions of prosecutor and judge to be discharged by the same individual.

3. Administrative agents as a group belong to the political branch of the government, and lack the training and experience necessary to give them judicial impartiality.

4. Congress, in making provision for administrative agencies, has frequently abdicated its proper function by turning over to such bodies a large share of public policy-making, which is carried on in secret and without controls.

5. Congress has created agencies as the need has arisen without attempting to fit them into any pattern or to standardize their procedures and methods.

The Attorney General's Committee was appointed in 1939 at the suggestion of the President to point out defects in the system and to recommend corrective steps. The report of this committee, after many Congressional hearings, and some few false starts, results in the passage of the Administrative Procedure Act of 1946.[8]

General Provisions

The Act begins as do other administrative statutes by laying down some broad definitions, the most important of which is the definition of an agency. An "agency"[9] is each authority of the United States Government other than Congress, the courts,[10] or the governments of the possessions, territories, or the District of Columbia; however, there are qualifications to this inclusive definition which exclude such agencies as those composed of representatives of parties to the dispute (*e.g.*, the National Railroad Adjustment Board), and practically all war-born agencies. Two other definitions of general importance show that a "person" includes individuals, partnerships, corporations, associations, and public or private organizations of any character other than agencies; while a "party" is any person or agency admitted as a party in an agency proceeding.

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[8]At least seven states had passed acts to control administrative procedure prior to the Federal enactment, as follows: North Dakota, N.D. Laws, 1941, c. 240; Ohio, Gen. Code of Ohio § § 154-174 (1943); Wisconsin, Wis. Laws, 1943, c. 375; Virginia, Acts of Assembly, 1944, c. 160; California, Stat., 1945, cc. 867-869; Illinois, Sen. Bill 117, Laws of Ill., 64th Gen. Ass'y. (1945); Pennsylvania, Pa. Acts, 1945, No. 442.

[9]5 U.S.C. § 1001 (a).

[10]As to whether the U.S. Tax Court is included in this exception see a full discussion in ADJUDICATION, *infra.*

A section on public information[11] should have a salutary effect in making available to the public, particularly attorneys, much information that is necessary to secure a fair hearing before an agency. This section requires each agency to publish in the Federal Register:[12] (1) Descriptions of its central and field organizations; (2) Delegations of final authority; (3) Places at which and methods whereby the public may secure information or make requests; (4) Statements as to the channeling of its functions; (5) Procedure followed in form and informal hearings; (6) Instructions for filling out its forms or reports; and (7) Orders or substantive rules issued by the agency. In order to give this section efficacy Congress added the statement that no person should in any manner be required to resort to any agency organization or procedure not so published. There has been only a partial compliance by the agencies with this provision for publication,[13] although the Federal Register of September 11, 1946, was increased from its usual bulk of approximately 60 pages to 966 pages. Some of the agencies have only made a token effort to comply, while others have published references to other existing publications, and still others have made *bona fide* attempts to comply, particularly the Federal Communications Commission. Two court decisions have been rendered on this point. In *Olin Industries, Inc. v. N.L.R.B.*,[14] a Federal district court nullified the apparent intent of Congress when it said that even if the N.L.R.B. has violated provisions of the Administrative Procedure Act as to publication of rules in the Federal Register, the employer may not enjoin action until publication because he is protected by the procedural provisions of the National Labor Relations Act. But, as to the effect of actual publication of notice in the Federal Register, the Supreme Court of the United States has said[15] that the appearance of rules and regulations in the Register makes them binding on all who seek to come within an act, regardless of actual knowledge of the regulations or the hardship from innocent ignorance.

Regulations concerning appearances and subpoenas[16] will be of more vital interest to lawyers than other sections of the statute. Under this regulation any person compelled to appear before an agency may be accompanied, represented, and advised by counsel or by other qualified representative, but it continues to the effect that nothing therein shall be construed either to grant or to deny to any person who is not a lawyer the

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[11] 5 U.S.C. § 1002.

[12] See the Federal Register Act, 44 U.S.C.* § § 301-314.

[13] See Sellers, *Extent of Agency Compliance with Section 3,* 33 A.B.A. (J. 7, 1947).

[14] 72 F. Supp. 225, 229 (D.C., Mass. 1947).

[15] Fed. Crop Ins. Corp. v. Merrill et al., 68 S.Ct. 1, 3 (1947). See Comment on this case in *Recent Decisions,* this issue.

[16] 5 U.S.C. § 1005.

right to appear or represent others before any agency or in any agency proceeding. Thus, the Act left open the question of what should be the requisites for a person to act as counsel before administrative agencies. To correct this deficiency a bill[17] has been introduced in the House of Representatives and referred to the Committee on the Judiciary. This bill would: (1) Set up a committee to license attorneys to practice before all agencies, the requirements being that the lawyer be in active practice and be accepted to practice before the Supreme Court of his state; (2) Require such extensive findings by an agency before licensing non-lawyers for practice that there would be very few such people licensed; (3) Require all persons who are licensed to practice before an agency to comply with the lawyer's code of ethics; and (4) Restrict counsel to lawyers, if the agency action is subject to judicial review. If this bill is enacted into law there will be more uniformity in the practice before agencies, all counsel will be subject to the same ethical standard, and the agency's examiner will be able to rely more confidently on the statements of counsel.

"Agency subpoenas authorized by law shall be issued to any party upon a statement or showing of *general relevance* and *reasonable scope of* the evidence sought" (emphasis added).[18] In these words the Administrative Procedure Act lays down the requisites for the issuance of an agency subpoena and its subsequent enforcement by the courts, and authorizes the issuance of a subpoena at the instance of any party to any agency action. This is the first administrative act which has authorized the use of the subpoena by any party to the proceeding. However, due to the phrase "authorized by law" and the fact that this leaves the authorization of subpoenas up to the enabling statute of the particular agency, it is submitted that the strict standard of general relevance and reasonable scope will not be the one by which the courts will enforce subpoenas. The basic inquiry in determining whether an agency subpoena is authorized should be whether the enabling statute of the agency in question covers the type information subpoenaed. It was early determined[19] that an application by an agency for the enforcement of a subpoena presents a case or controversy to which the judicial power extends; but as to the inquiry of coverage the courts have taken at least four views:

1. Coverage must be shown before a subpoena will be enforced.[20]

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[17]H. R. 2657; see Randall, *Administrative Practitioners Bill,* 31 J. Am. Jud. Soc. 49 (1947). The bill is popularly referred to as the "Gwynne Bill" for its author, Congressman John Gwynne (R-Iowa).

[18]5 U.S.C. § 1005 (c). For a summary of the provisions of the statutes authorizing agency subpoenas see Rep. Att'y. Gen. Comm. Ad. Proc., App. K, 414 (1941).

[19]Interstate Commerce Commission v. Brimson, 154 U.S. 447 (1894).

[20]Gen. Tobacco & Grocery Co. v. Fleming, 125 F.2d 596 (CCA 6th 1942).

2. A reasonable ground for belief that there is coverage must be shown.[21]

3. The determination of coverage is for the administrator and it is not necessary to show a reasonable belief of coverage.[22]

4. The Court requires neither a showing of coverage nor a basis for a reasonable belief of coverage.[23]

Since this last principle was established by a recent decision of the U. S. Supreme Court, it is believed that the courts will not follow a strict interpretation of this portion of the Administrative Procedure Act and require a showing of general relevance and reasonable scope of the evidence sought, *i.e.*, coverage. Instead, the holding of the last cited case will probably be adopted as the proper interpretation of the requirement for a showing of general relevance and reasonable scope.

Rule-Making

"Rule-making" is the agency process for the formulation, amendment, or repeal of a rule. A "rule" is the whole or any part of any agency statement of general or particular applicability and future effect designed to prescribe law or policy, including approval for the future of those rates, wages or other items delegated to the control of the particular agency.[24] This terminology is definitely laid down with the intention that it should be used to clarify meanings, but the agencies continue to employ their customary nomenclature with confusing results.[25] Because rule-making is the exercise by any agency of delegated legislative power, it results in future policies and is in no sense judicial. Consequently, there is less formality about rule-making procedures than there is in adjudications; in fact, most matters of this nature are settled informally before the necessity arises for the formal process of rule-making.

As to formal proceedings, it is necessary for the agency to publish general notice of proposed rule-making in the Federal Register. This

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[21]Walling v. Benson, 137 F.2d 501, 149 A.L.R. 186 (CCA 8th 1943); S.E.C. v. Tung, 32 F. Supp. 371 (N.D. Ill. 1940).

[22]Endicott Johnson Corp. v. Perkins, 317 U.S. 501 (1943).

[23]Okla. Press Pub. Co. v. Walling, 327 U.S. 186 (1946).

[24]5 U.S.C. § 1001 (c). This definition, as well as the one of adjudication, probably came from the statement of the Supreme Court, through Hughes, J., where it was said that a judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under existing laws, while legislation looks to the future and changes conditions, making new rules to be thereafter applied. Prentiss v. Atlantic Coast Line, 211 U.S. 210, 212 (1908); *see* also L. & N. R. v. Garrett, 231 U.S. 298 (1913).

[25]Carrow, Background of Administrative Law 31 (1948).

notice must include a statement of the time, place, and nature of the proceedings, the authority under which the rule is proposed, and either the terms or the substance of the proposed rule, or a description of the subjects and issues involved.[26] It should be noted that there is no statutory requirement in this Act as to how long notice must be published prior to the hearing for formulating a rule. Hearings often may be conducted informally except where statutes require a record to be made, in which case later provisions of the Act govern, as they do in adjudication. Finally, since a rule is in the nature of legislation it is required that it be published in the Federal Register thirty days before its effective date.[27]

Adjudication

In distinguishing adjudication and the resultant order from rule-making and rules it is imperative that it be realized that an adjudication is a judicial inquiry by an agency which investigates and enforces liabilities as they stand on present or past facts and as a result of existing law. Hence, it is to be anticipated that an adjudication will be more formal than rule-making procedure, and the results will be binding on a person or his property for past wrongful acts rather than determinative of future conduct. "Adjudication" is the agency process, then, of issuing "orders." This latter term is defined as the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule-making, but including licensing.[28]

Exclusions from the provisions as to adjudications present the first important ambiguity in the Act.[29] The statute excepts any matter which is subject to a subsequent trial *de novo* in any court. This provision raises a question as to whether the functions of the Bureau of Internal Revenue are subject to the provisions of the Administrative Procedure Act, since the Bureau's decisions are subject to being tried *de novo* in the U. S. Tax Court. If the Tax Court is a court then the tax functions of the Bureau of Internal Revenue are excepted from the provisions of this act. However, in spite of some authority to the effect that the Tax Court is a court, it is submitted that a reference to the statute setting up the Tax Court and an analysis of cases which have dealt with this subject will show that the U. S. Tax Court is not a court such as is meant in this exception. The definition of the U. S. Tax Court, as laid down originally when it was called the Board of Tax Appeals, was "an independent agency in the

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[26] 5 U.S.C. § 1003 (a).
[27] 5 U.S.C. § 1003. But unfortunately there is no requirement as to the time during which notice must be published before conducting a hearing.
[28] *Id.* § 1001 (d).
[29] *Id.* § 1004.

executive branch of the Government," and the definition has not been changed by subsequent enactments.[30] There have been several court decisions on this point, but no direct holding to that effect by the Supreme Court of the United States. A decision before the change in name held that it was an agency, not a court;[31] since the change in name, the Fifth Circuit Court of Appeals has held that the Tax Court is an agency, not a court;[32] and two broad dicta are found in recent Supreme Court cases to the effect that the Tax Court is an agency.[33] It is true that the Attorney-General stated in testifying before a Senate committee[34] that the Tax Court is a court, and also that the celebrated *Dobson* case,[35] wherein the Supreme Court refused to review any question coming from the Tax Court except a "clear cut question of law," might be interpreted to show that the Tax Court is a court. But when the Supreme Court actually has to decide the question, the best authority will support a decision to the effect that the Tax Court is an agency.

This same ambiguity arises to confuse other situations than that of the Tax Court. Other administrators may wonder if their decisions are triable *de novo* when they are reviewed by various courts. The Administrator of the Customs Laws may wonder if his decisions are triable *de novo* when they are appealed to the Court of Claims, and the Patent Office may be undecided as to whether judicial proceedings which are invoked to test a patent make their actions subject to a trial *de novo*. Finally, one of the usual ways of enforcing many agency orders is by invoking the aid of the appropriate Federal court. Does the order sought to be enforced amount to an order which is subject to a subsequent trial *de novo*? These uncertainties have not been settled by the courts, and there seems to be no material available which will aid in ascertaining the intent of Congress in putting this exception into the Act so that actions which are subject to a trial *de novo* are not covered by the provisions of the Administrative Procedure Act.

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[30]Rev. Act of 1924 § 900 (k), 43 STAT. 253, 338; see also Rev. Act of 1928 § 901 (a) *et seq.*, 44 STAT. 9, *et seq.*; Int. Rev. Code § 1100; Rev. Act of 1942 § 504 (a), 56 STAT. 957 (which changed the name to U.S. Tax Court, but did not change the definition or powers.)

[31]At p. 725 of Old Colony Trust Co. v. Comm'r, 279 U.S. 716 (1929).

[32]Hutchings-Sealy Nat. Bank v. Comm'r, 141 F.2d 422 (CCA 5th 1944).

[33]Comm'r v. Gooch Milling & Elevator Co., 320 U.S. 418, 420 (1943): "The Board is but 'an independent agency in Executive Branch of the Government.'" Comm'r v. Sunnen, 68 S. Ct. 715, 724 (1948): "Initial determination . . . was one to be made by the Tax Court. That is the agency designated by law to find and examine the facts and to draw conclusions. . ."

[34]Committee Print, S.7, 79th Cong., 1st Sess. (June 1945) 8.

[35]Dobson v. Comm'r, 320 U.S. 489 (1943).

Hearings and Decisions

One of the most virulent attacks made on the administrative process prior to this Act was that the investigating, prosecuting and hearing officer was the same person in many instances.[36] Partially at least the Act has taken steps to avoid this criticism, by requiring hearings to be conducted by a presiding officer who must be either the agency as a body, one member of the agency, or a hearing examiner as provided for in the Act.[37] There is, of course, no separation of functions at the agency level for the obvious reason that the members of the agency itself must act in all capacities, especially advisory, for the agency to carry out its delegated powers. Although this be true, the examiners are subject to what has been called an "internal" separation of functions, *i.e.,* they are assigned to individual agencies and stay with that agency, hearing its adjudications; they are selected by civil service and may not be assigned any duties inconsistent with their duties as examiners. Thus there is provided what, in the courts, are known as masters, referees, or commissioners.

Attorneys will naturally be interested in the provisions of the Act concerning evidence. The method of attacking this problem has been to lay down the principles which shall govern the admissibility of evidence, rather than leaving this matter to the rules which obtain in courts. This is probably the best method of clearly specifying the intent of Congress and may avoid many vexing disputes over evidence. The Act has placed the burden of proof on the proponent of a rule or order and has provided that any oral or documentary evidence may be received, but has said that an agency shall *as a matter of policy* provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.[38] Thus, it is not necessary for the examiner to exclude incompetent witnesses, and the right of cross-examination is limited if the examiner thinks it is unduly repetitious. This last statement seems to be true regardless of the assurance in the statute that a party has a right to conduct such cross-examination as may be required for a full and true disclosure of the facts. The biggest improvement, as to evidence, is that no order may be issued except on consideration of the whole record, which must support the order by reliable, probative, and substantial evidence.[39] The weakness of this provision is that it does not require records to be made except where enabling statutes already so

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[36]See REP. ATT'Y. GEN. COMM. AD. PROC., App. H, 375 (1941), on hearing officers prior to the Administrative Procedure Act.

[37]5 U.S.C. §§ 1006 (a), 1010.

[38]5 *Id.* § 1006 (c).

[39]As to substantial evidence and its meaning, see the discussion in JUDICIAL REVIEW, *infra.* For a recent decision saying that the Federal Trade Commission is not bound by rigid rules of evidence, see F.T.C. v. Cement Institute, 68 S.Ct. 793, 806 (1948).

provide. Hence, where a record is not required the Act does not assure a decision based upon a consideration of the whole record.

Decisions which result from the hearings are patterned on judicial decisions in that an "initial" decision will be rendered by the hearing examiner.[40] This initial decision, when rendered, will be made a part of the record and will be submitted to each of the interested parties. If either party objects there may be an appeal to the agency, but if there is no appeal from this initial decision then it shall become the final decision. Attorneys must be careful to lodge their objections with the hearing examiner before such time as the initial decision becomes final by operation of law. When objections are submitted they will be entered in the record, making them available to the agency on the appeal to it. The decision is different procedurally when the agency itself makes the initial decision for then its initial decision is a recommended decision which can be objected to by an interested party, with the agency determining whether or not effect will be given to the objection in formulating the final decision.[41]

Judicial Review

Discussion of the allowance of judicial review of agency action should start at the source, and should inquire why all matters covered by the administrative process should not be left for judicial determination rather than being given over to administrative agencies. There are strong reasons for continuing the administrative process, and it is believed that the wisdom of such can be shown. First, many of the functions performed by administrative agencies are of such a technical nature that experts are required to determine the facts. This can readily be understood in the fields of banking, insurance, conservation of oil and gas and other such specialized fields. The courts and juries under our legal system would not be competent to decide many of the intricate technical questions that come before these agencies and others. Also, a centralized regulatory body such as the Interstate Commerce Commission can more readily maintain a fair, uniform, and integrated policy than could be obtained by resort to courts spread all over the United States. Third, the experience with such laws as Workmen's Compensation has evidenced the inability of courts to adapt

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[40] 5 U.S.C. § 1007 (a).

[41] 5 U.S.C. § 1004 (d) authorizes the issuance of declaratory orders. See Eccles *et al.* v. Peoples Bank of Lakewood Village, Calif., 68 S. Ct. 641 (1948), where the Court said that under the fact situation there it was not necessary that a declaratory order issue. In the Rep. Att'y. Gen. Comm. Ad. Proc. 466 (1941), there is a summation of the extent to which administrative agencies have relied on precedents. See S.E.C. v. Chenery Corp., 332 U.S. 194 (1948), where it was said that whether an administrative agency shall proceed by general rule or by individual *ad hoc* decisions rests within the informed discretion of the administrative agency.

themselves readily to carrying out the legislative intent of statutes which are in derogation of the common law. Finally, and this is one of the most important reasons, the courts would be swamped by the volume of work handled by many of the agencies, such as the Social Security Board or the Veterans' Administration.[42] So, the wisdom of retaining the agencies having been shown, the question arises as to when it is necessary to provide judicial review of the determinations of the various agencies.

As has been pointed out by Justice Brandeis, there is nothing in the Constitution requiring judicial review of the findings of fact made by an administrative agency;[43] but, on the other hand, there is nothing to restrict judicial review if there is a case or controversy present. In fact, if there is a Constitutional right of a person involved, the courts must take jurisdiction and decide the case. But in our system of government, in addition to Constitutional courts and rights there are statutory courts and rights, and there is a long series of cases to support the idea that since Congress often confers statutory rights on persons then it may fix conditions for appeal to the courts in connection with such rights.[44] It thus becomes necessary to refer to the various administrative statutes to determine the question of what judicial review is available.

The Administrative Procedure Act provides that any person suffering legal wrong because of any agency action, or who is adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.[45] Furthermore, every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. The only two reported decisions, to date, on

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[42]See CARROW, BACKGROUND OF ADMINISTRATIVE LAW 147 (1948); REP. ATT'Y. GEN. COMM. AD. PROC. 11-18 (1941).

[43]At p. 76 of St. Joseph Stock Yards Co. v. U.S., 298 U.S. 38 (1936).

[44]Probably the first case decided in this connection was American Ins. Co. v. Canter, 1 Pet. 511 (U.S. 1828), wherein Chief Justice Marshall decided that the territorial courts of Florida were authorized by Art. IV, Sec. 3, of the Constitution, not Art. III, so Congress could give or withhold jurisdiction and powers to these courts as it wished. The "Legislative Court" concept has been extended to other courts, such as the Court of Customs Appeals, *Ex parte* Bakelite Corp., 279 U.S. 438 (1929); Court of Claims, Williams v. U.S. 289 U.S. 553 (1933); and the concept was most clearly shown when the Supreme Court said, in Federal Radio Comm'n v. Gen. Elec. Co., 281 U.S. 464 (1930), that it did not have jurisdiction to review a finding of the U.S. Court of Appeals for the District of Columbia for the court was a legislative court and acted only as a superior revising agency, and after an amendment of the statute so that the Court of Appeals reviewed only questions of law, then the Supreme Court took jurisdiction of an appeal from the Court of Appeals, in Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266 (1933), since under the amended statute the Court of Appeals had made a judicial determination of the issue. See also, as to ability of Congress to fix conditions for review of administrative orders, American Power Co. v. S.E.C., 325 U.S. 385. 389 (1944) and Oklahoma v. U.S. Civil Service Comm'n, 330 U.S. 127, 137 (1947).

[45]5 U.S.C. § 1009 (a).

these sections, refuse to allow this statute to expand the right to judicial review. One decision says that the sections are merely declaratory of the existing law of judicial review and they neither confer jurisdiction on the Federal district court above and beyond that which it already had, nor grant to aggrieved parties any rights they did not have under the prior statutes.[46] The other holds that insofar as a provision of the statute governing the agency in question limits review, such limitation is unaffected by the review provisions of the Administrative Procedure Act.[47] This latter case is in line with former decisions that where Congress has precluded judicial review of the finding of an administrative board, the courts will refuse to review such findings.[48] It would seem more propitious for Congress to set up some uniform method of securing judicial review, the need for which was illustrated by the statement of Justice Frankfurter when he said that Congress has distributed responsibility for enforcing laws so that the manner of enforcement runs a gamut from authorizing a judicial trial *de novo* of an administrative claim to denying all judicial review.[49]

Review of Rules

An early decision[50] holds that rules, being in their nature legislative, are not reviewable by the courts. Of course, they are reviewable as is any statute, *i.e.,* if a case or controversy arises under the rule or statute, an affected person has the right to contest its constitutionality. So a review may be had of the constitutionality of an administrative ruling. Congress, in the exercise of its power to say what rules will govern the privileges and rights it creates by statute, did provide for the review of rules promulgated under the Bituminous Coal Act of 1937 and the Fair Labor Standards Act of 1938. In the absence of either of the above grounds the Supreme Court

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[46]Olin Industries v. N.L.R.B., 74 F. Supp. 225 (D.C. Mass. 1947).

[47]U. S. *ex rel* Trinier v. Carusi, 72 F. Supp. 225 (D.C. Mass. 1947). *But see* U. S. v. Zazove, 68 S. Ct. 1284, 1288 (1948); Wong Yang Sung v. Clark, 80 F. Supp. 285 (D.C.D.C. 1948); and Unger v. U. S., 79 F. Supp. 281 (E.D. Ill. 1948).

[48]LABOR: See Switchmen's Union of N. A. v. National Mediation Board, 320 U.S. 297 (1943); A. F. of L. v. N.L.R.B., 308 U.S. 401 (1941). VETERANS: See U. S. v. Zazove, *supra* note 47; Lynch v. U.S., 292 U.S. 571 (1934); Silberschein v. U.S., 266 U.S. 221 (1924); Van Horne v. Hines, 122 F.2d 207 (App. D.C. 1941); U. S. v. Mroch, 88 F.2d 888 (CCA 6th 1937). IMMIGRATION EXCLUSION: U. S. v. Evans, 68 S. Ct. 634 (1948); Wong Yang Sung v. Clark, *supra* note 47; U. S. *ex rel* Trinier v. Carusi, *supra* note 47. DETERMINATIONS OF THE GENERAL LAND OFFICE: U.S. v. Ju Toy, 198 U.S. 253 (1905). DETERMINATION OF POST OFFICE IN FRAUD CASES: Precluded by statute, but *cf.* Donaldson v. Read Magazine, 68 S. Ct. 591 (1948).

[49]Stark v. Wickard, 321 U.S. 312, 313 (1944).

[50]L. & N. R. v. Garrett, 231 U.S. 298 (1913); Prentis v. Atlantic Coast Line R., 211 U.S. 210 (1908).

has refused to review a rule of an administrative agency in the case of *Columbia Broadcasting System, Inc. v. U. S.*[51] There the Court held that the "chain broadcasting" regulations of the Federal Communications Commission could be reviewed even though they were rules and there was no action for enforcement involved. This holding was predicated on the fact that the rules operated in advance to compel those who expected renewal of licenses to readjust contractual relations, and were thus, in effect, orders subject to the review provisions of the Federal Communications Act.

Review of Orders

Orders, being the result of a quasi-judicial inquiry by an administrative agency, are reviewable where a quasi-legislative rule is not. This difference is sound since administrative agencies in their adjudications may invoke sanctions against a person or his property for wrongful conduct, and every person should have his day in court. There are two basic requisites without which a person will be unable to have the order affecting him reviewed. Only a person with a "legal standing" may attack one of these administrative acts. This nebulous standard probably means that a person must have a statutory right to challenge the act[52] or a Constitutional right to a judicial determination of the issue.[53] A litigant with this "legal standing" must then show the court that he has exhausted his administrative remedies before the court will review the controversy.[54]

If the above requirements are met, a method must then be found to invoke the powers of a court to inquire into the administrative action, for there is no review as a matter of right and usually no uniform procedure for securing such a review. The first method of securing a review is non-statutory and is initiated by bringing injunctive proceedings against the agency's enforcement of the order. The Supreme Court has said that the

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[51]316 U.S. 407 (1942).

[52]Alexander Sprunt & Sons v. U.S. 281 U.S. 249 (1930).

[53]St. Joseph Stock Yards Co. v. U.S., 298 U.S. 38 (1936); see also REP. ATT'Y. GEN. COMM. AD. LAW 84-85 (1941).

[54]Aircraft & Diesel Equipment Corp. v. Hirsch, 331 U.S. 752 (1947) (The doctrine that one is not entitled to judicial relief until the prescribed administrative remedy has been exhausted, wherever applicable, does not require merely the initiation of prescribed administrative procedures, but they must be pursued to their appropriate conclusion, and final outcome must be awaited before seeking judicial intervention); Asher v. Forrestal, 71 F. Supp. 470 (D.C. 1947) (Court may not grant an injunction directing restoration of plaintiff to civil service position until charges against plaintiff have been disposed of administratively and finally); Anderson v. Schwellenbach, 70 F. Supp. 14 (N.D. Cal. 1947) (No person is entitled to judicial relief for a supposed or threatened injury until he has exhausted the prescribed administrative remedies); Avon Dairy Co. v. Eisaman, 69 F. Supp. 500 (N.D. Ohio 1946) (District Court did not have jurisdiction to entertain an application for preliminary injunction pending disposition of complainants' proceedings before Secretary of Agriculture).

extent of authority granted to an agency to issue orders is subject to judicial review, and a district court is authorized to enjoin such order if the agency acts beyond the limits of its statutory authority.[55] Statutes oftentimes specify varying methods for review of administrative orders. These statutes will either specify injunctive proceedings, allow the party against whom the order was adjudged to secure a review in the Circuit Court of Appeals,[56] provide special or legislative courts to review the agency's findings, or empower the agency to enforce the order by petitioning the Circuit Court of Appeals in such manner that a review will be had in that court.[57] Finally, certiorari is sometimes allowed to a named court, and collateral attacks on the validity of the order may be available.

In a sub-section entitled "Scope of Review" the Act attempts in a very few words to state principles which are so broad that they add very little to prior statutes and court decisions on this subject.[58] The direction of the statute is that reviewing courts shall decide all relevant questions of law, interpret Constitutional and statutory provisions, compel agency action wrongfully withheld, and set aside agency action which is arbitrary, capricious, contrary to Constitutional right, in excess of statutory jurisdiction, without observance of procedure required by law, or which is unwarranted by the facts. These principles, it can be seen at a glance, have been ingrained in the law of our country from its beginning and were part of its antecedents. However, the Act restates one provision of many administrative statutes when it says that the court shall set aside any agency action which is unsupported by substantial evidence where the agency hearing was required to be on a record. There is only one thing clear about the expression "substantial evidence" and that is that it does not require strict compliance with the rules of evidence with which lawyers are familiar in their court work. One distinguished author has said that there are cases which say that the phrase means a scintilla of evidence, or no more than a bare minimum of evidence, and cases in which less than substantial evidence is equated to arbitrary actions, cases in which substantial evidence is equated to the directed verdict in a jury trial, cases in which substantial evidence is found to exist if the court believes that there is a "rational basis" for the decision, and cases in which the requirement is that the findings be

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[55]Federal Reserve v. Agnew, 329 U.S. 441, 444 (1947); see Cox v. U.S., 157 F.2d 787 (CCA Id. & Or. 1946) (Findings of fact of an administrative agency which go to the jurisdiction of the agency and which affect Constitutional rights are not conclusive and may be tried by the court *de novo*.)

[56]See Interstate Commerce Act, 54 STAT. 913, 49 U.S.C. § 17 (9) (1940); Securities and Exchange Act of 1934, 48 STAT. 881, 901 (1934), 15 U.S.C. § 78 (y) (1940).

[57]*Supra* note 44.

[58]5 U.S.C. § 1009 (e).

supported by the weight of the evidence.[59] From this summary of the different holdings, it can be seen that it would be a fruitless attempt to say what any certain court would find to be sufficient substantial evidence to support a finding of an agency. As to the probable intent of Congress, Dean Stason has stated what he believes is the intended meaning:

> There is ample ground to believe that Congress intended by the substantial evidence rule that the courts should survey the entire record and sustain the administrative fact decision if the evidence, including inferences therefrom, is found to be such that a reasonable man acting reasonably might have reached the decision.[60]

This statement is not very definite but it is couched in terms that lawyers understand.

Conclusion

The Federal Administrative Procedure Act of 1946, in it application, has many defects—its exclusions are ambiguous and often unjustified, there is no requirement that efficient attorneys shall counsel interested parties, the terminology has not been followed by the agencies or courts, the requisites for administrative subpoenas have not always been strictly met, there is no provision covering the time in which notice must be given before an agency formulates a rule, the dicotomy of quasi-legislative and quasi-judicial functions is not sufficiently established, the scope of admissible evidence is not clearly encompassed, and there is no uniformity as to judicial review—but Congress has taken the first long step toward the control of the many component parts of the administrative process. Questions occur as to what is the eventual destination of this first step, what is the overall Congressional purpose, and what is the desired end result of this process of control which has been started. It is submitted that the goal of this beginning should be a closer integration of the separate legislative and judicial departments of our government into two clearly delineated cohesive units.

In order to accomplish this purpose Congress must first accomplish the difficult task of establishing a clearer delineation between quasi-legislative and quasi-judicial functions of administrative agencies. Then it must

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[59]Stason, *"Substantial Evidence" in Administrative Law*, 89 U. of Pa. L. Rev. 1026, 1036-38 (1941). See Wade, *Recent Mississippi Oil and Gas Cases*, 18 Miss. L. J. 243, 264-266 (1947) for a discussion of the meaning of "substantial evidence" in the Mississippi Supreme Court.

[60]*Id.* at p. 1051. For a discussion on "substantial evidence" in Mississippi, *see* Wade, *Recent Mississippi Oil and Gas Cases*, 18 Miss. L. J. 243, 263 (1947).

control its quasi-legislative bodies and establish firm bases on which the quasi-judicial bodies can function independently, as do the courts. The Congress must not grant to administrative agencies its powers of controlling policy in legislative matters, and must delegate to these quasi-legislative agencies only the right to fill in the details. Furthermore, it must retain control over these bodies by frequent inquiry into the actions based on delegated powers, to see that procedures are followed and acts taken which are at the same time impartial and in conformity with the legislative purpose. It should be noted that recent administrative acts, such as that authorizing the O. P. A., the Atomic Energy Committee, and others, tend more nearly to retain the recommended control in Congress. Finally, uniformity as to the method for testing the constitutionality of these legislative acts should be assured.

The firm foundation on which quasi-judicial bodies can operate may be supplied by Congress by insisting, in the first instance, on a complete separation of the personnel functions of the agencies as to investigations, prosecutions, and hearings of adjudications. This separation can be accomplished if trial examiners are required to hear and decide, initially, all cases; if the requirements for and the pay of examiners are raised to the extent that they acquire dignity and independence; and if all investigating and prosecuting functions are left to the members of the agency itself and other employees. Next, Congress must see that clear and efficient procedures are followed by the agencies (*e.g.,* all adjudications should be made on a full and complete record) and that such evidence is admitted as will best reflect the true facts of the situation. Also, there should be laid down regulations which require competent attorneys as counsel and clear precise orders as the result of an adjudication. To complete the judicial mien of these quasi-judicial bodies there should be a uniform system for appeal to the courts, on which appeals the courts would verify the application, by the agency, of the law to the facts found by the examiner.

To achieve this integration the administrative bodies have the task of fostering a spirit of public service in all employees, as a result of which all parties are treated fairly and the legislative directives are explicitly followed, not exceeded. The agencies must also scrupulously maintain the separation of personnel functions outlined above, to the end of respecting their trial examiners to the extent that there is attained that judicial impartiality without which a judicial or quasi-judicial decision is worthless. If this impartiality is attained then the facts found by trial examiners will be equally as fair and just, as are the findings of a jury.

Lastly, the courts must share in this overall integration by bringing to an end any competition or animosity which may exist between them and the administrative bodies. They must follow the legislative mandate in review-

ing the constitutionality of a rule or in seeing that an agency has correctly applied the law to the facts found by the examiner. Then, instead of retreating into its corner and refusing to be bold enough to question the findings of an expert examiner, the court must subject the findings of an examiner to the same scrutiny to which the findings of a jury are subjected.

If the above recommendations are accomplished there will result an integrated legislative department laying down broad policies by acts of Congress, and filling in the details by a *controlled* delegation of powers to administrative agencies. Similarly, there will be an integrated judicial department, distinct from the legislative department, granting equal justice to all and at the same time taking full advantage of the accomplishment of technical functions, the maintenance of an integrated policy, and the handling of a huge volume of work, to which ends the administrative process is best suited.

Roland D. Marble

Administrative Law—Publication of Regulation in Federal Register Limits Scope of Crop Insurance Contract by Federal Agency

Respondents applied to their local conservation committee, agent for Federal Crop Insurance Corporation,[1] for wheat crop insurance, stating that part of the crop was to be spring wheat reseeded on winter acreage. The committee advised respondents that the entire crop was insurable and recommended to the Corporation acceptance of the application, which did not disclose that part of the crop was reseeded. Crop Insurance Regulations provided that the reseeded portion could not be insured,[2] and when the crop was destroyed the Corporation denied liability. Neither insured nor insurer's local agent had actual knowledge of the regulation, incorporated in the application only by reference, although it had been published in the Federal Register. Held (5-4): The regulation, published in the Federal Register, limited respondents' contract of crop insurance in the same manner as if it were an express statutory provision. *Federal Crop Ins. Corp. v. Merrill et al.*, 68 Sup. Ct. 1 (1947).

By Section 307 of the Federal Register Act,[3] the Congress provides that documents authorized or required to be published by Section 305 (a) shall be filed with the Division of the Federal Register and a copy made available for public inspection and that, with certain exceptions, such filing of any document "shall . . . be sufficient to give notice of the contents of such document to any person subject thereto or affected thereby." This section of the Act appears to combine the doctrine of constructive notice of documents recorded under state recording statutes[4] and the ancient fictional presumption that every one is presumed to know the law, with the result that both are extended.[5]

This section of the Federal Register Act was first applied in *Henderson v. Baldwin*,[6] in which the court held that the defendant had constructive notice of maximum rent regulations promulgated by the OPA and filed with the Division of the Federal Register. In several later cases arising out of the administration of the price and rent control provisions of the OPA, Federal and State courts have held that publication of regulations in the Federal Register is constructive notice to all affected by them.[7]

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[1]Created by the Federal Crop Insurance Act, as an "agency of and within the Department of Agriculture." 52 Stat. 72 (1938), as amended, 7 U.S.C.A. § 1503 (Supp. 1947).

[2]The controlling regulation explicitly states that the term "wheat crop shall not include . . . spring wheat which has been reseeded on winter wheat acreage in the 1945 crop year." Wheat Crop Insurance Regulations, § 414.37(v), 10 Fed. Reg. 1591 (1945).

[3]49 Stat. 500 (1935), 44 U.S.C.A. 301 (1935).

[4]Miss. Code Ann. § § 867-869 (1942); Smith County Oil Co. v. Jefcoat, 33 So.2d 629 (Miss. 1948); Sowell v. Rankin, 120 Miss. 458, 82 So. 317 (1919); Finance & Guarantee Co. v. Defiance Motor Truck Co., 145 Md. 94, 125 A. 585 (1924); Sowden & Co. v. Craig, 26 Iowa 156, 96 Am Dec. 125 (1868).

[5]Harper v. Atlanta & W. P. R. Co., 33 Ga. App. 259, 125 S.E. 885 (1924); Northern Trust Co. v. Consolidated Elevator Co., 142 Minn. 132, 171 N.W. 265 (1919); United States v. Detroit Timber and Lumber Co, 200 U.S. 321 (1906); Thomas v. Flint, 123 Mich. 10, 81 N.W. 936 (1900).

[6]54 F. Supp. 438 (W.D. Pa. 1942).

[7]Henderson v. Nixon, 66 Idaho 780, 168 P.2d 594 (1946) (rent control); Flannagan v. United States, 145 F.2d 740 (C C.A. 9th 1944) (price control); Slack v. Glenwood Sightseeing Bus Co., Misc. 1944, 47 N.Y. Supp. 876 (price control); *see* Yakus v. United States, 321 U.S. 414, 435 (1944) (price control).

However, these cases all arose from the administration of rules and regulations promulgated by regulatory agencies of the Government, organized and sustained under the extraordinary powers granted to the President in time of war. In contrast, the Congress, by enactment of the Federal Crop Insurance Act, sought to benefit wheat farmers and the nation by making available all-risk crop insurance deemed too great a hazard by private insurance companies.[8]

The principal case was the first to reach the Supreme Court in which it was called upon to apply Section 307 of the Federal Register Act to an insurance contract issued by the Federal Crop Insurance Corporation. It seems that a better result would have been reached if the court had laid down a rule which required Federal agencies writing crop insurance policies to embody the entire contract between the policyholder and the insurance corporation in the application and the policy issued.[9] This would do no more than require the Government agencies to do what private insurance companies are required to do by many state laws,[10] and it would recognize the practical fact that few, if any, farmers subscribe to and read the Federal Register.[11] Such a rule would require few changes in the rules and procedures of the agencies and would assure an administration of the Federal Crop Insurance Act more in accord with the intent of Congress. Nevertheless, by its holding in the principal case the Court has extended the doctrine of constructive notice so as to permit a regulation of a Government agency published in the Federal Register to control a contract entered into between the agency and an individual citizen, in the same way it might be limited by a regularly enacted statute.

Horace M. Watkins

Attorneys—Unauthorized Practice of Law—Accountant Barred from Advising on Tax Question Not Connected with Actual Accounting Work.

Certified public accountant was consulted by taxpayer as to whether taxpayer could pay delinquent sales taxes for past years in one year, and deduct these from his Federal income tax return for that year. Accountant had nothing to do with taxpayer's books or preparation of return, but merely advised on the law involved. Held: Accountant may prepare tax returns and assume jurisdiction of incidental legal questions, but he is engaged in unauthorized practice of law if he passes on

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[8]Federal Crop Ins. Corp. v. Merrill, 68 Sup. Ct. 1, 3 n. 1 (1947). 52 Stat. 72 (1938), 7 U.S.C.A. 1502 (1938).

[9]*See* Mr. Justice Jackson, dissenting in Federal Crop Ins. Corp. v. Merrill, *Id.* at 4.

[10]Lynch v. United States, 292 U.S. 571 (1934); Cory Bros. & Co. v. United States, 51 F.2d 1010 (C.C.A.2d 1931); United States v. American Sales Corp., 27 F.2d 389 (1928).

[11]Wigmore, *The Federal Register and Code of Federal Regulations—How to Use Them—If You Have Them,* 29 A.B.A.J. 10 (1943). The official figures given by the author are as follows: Number of subscriptions to the Federal Register: By public and university libraries, 115; By bar or other law libraries, 48, going to only twenty states; By individuals, 10,000 (about); To government offices (free), 8,500. A letter from the Director, Division of the Federal Register, dated June 30, 1948, discloses that current subscriptions by classes are as follows: Depository libraries (including public and university libraries), 404; Individuals (paid), 5325; Government offices (free), 7,129. Five of the copies go to depository libraries for the State of Mississippi. Other figures for Mississippi were not available

questions of law *as an independent consultant. Application of New York Lawyers Association, In re Bercu.* 72 N.Y.S.2d 209 (1948).

The practice of law is generally understood to include doing or performing services in the courts in any proceeding therein, throughout its various stages, and on conforming to the accepted rules of procedure. It additionally includes the giving of legal advice and counsel, and the preparation of instruments by which rights are secured, whether or not such matter is pending in a court.[1] Compensation for such services is understood to be concomitant with the rendering thereof.[2]

The preponderance of authority in this country holds that the judicial branch has the exclusive power to determine what constitutes the practice of law.[3] But in the principal case the respondent based his argument on the proposition that despite the decisions in all states which had passed on the question to the effect that what is the practice of law is for the courts to determine, there was no prohibition of the practice of law by laymen in New York, and that the determination of what constitutes the practice of law was not for the courts to decide. The court did not deviate from the pattern of other jurisdictions holding that fundamentally the judiciary determines what constitutes the practice of law, and merely proceeded to draw a distinction between law practice and accountancy. Thus, by determining what was the practice of law, the court reaffirmed the ascendancy of the judiciary in making such determinations.

A rather comprehensive decision was handed down in Ex rel. *Johnson v. Childe,*[4] in which the court held not only that a state legislature or commission could not authorize non-lawyers to practice before commissions if they were in fact practicing law, but that only the court could authorize such persons to practice; that the court alone could say what constituted the practice of law, and that the court could punish for contempt anyone presuming to practice without a license.

In matter affecting accountants and the law, it has been held that the examination of statutes, judicial decisions, and departmental rulings, for purposes of advising upon a question of law, and the rendering of an opinion thereon, are part of the practice of law.[5] Obviously, the field of taxation is productive of many matters which conceivably could fall within the limits of both law and accountancy, and thus the distinction between the two fields is dim. The legitimate boundaries of the activities of tax experts cannot be clearly staked out, apparently, but must be left to be determined according to the particular circumstances of each case.[6]

The court in the principal case has drawn a distinction of a sort between the practice of law and accountancy, a distinction which is a new guidepost. However,

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[1]People v. Skipper, 61 Cal. App.2d 844, 142 P.2d 960 (1943); Gill v. Richmond Co-op. Ass'n, 309 Mass. 73, 34 N.E.2d 509 (1941).

[2]State *ex rel* Junior Ass'n of Milwaukee Bar v. Rice, 236 Wis. 38, 294 N.W. 549 (1940); Fitchette v. Taylor, 191 Minn. 582. 254 N.W. 910 (1934).

[3]Opinion of the Justices, 289 Mass. 607, 194 N.E. 313 (1935); Judd v. City Trust & Savings Bank, 133 Ohio St. 81, 12 N.E.2d 288 (1937).

[4]147 Neb. 527, 23 N.W.2d 720 (1946).

[5]Lowell Bar Ass'n v. Loeb, 315 Mass. 176, 52 N.E.2d 27 (1943); Mandelbaum v. Gilbert & Barker Mfg. Co., 160 Misc. R. 656, 290 N.Y.S. 462 (1936).

[6]State *ex rel* Junior Ass'n of Milwaukee Bar v. Rice, *supra* note 2; *In re* Shoe Mfgrs. Protective Ass'n, 295 Mass. 369, 3 N.E.2d 746 (1936); *In re* Petition of Grievance Committee of New Haven Bar v. Payne, 128 Conn. 325, 22 A.2d 623 (1941).

the significance of the case rests in the respondent's audacious attempt to destroy the judiciary's control over the practice of law, and the court's indifference to this contention indicates the disdain which the judiciary should be expected to show in the face of such effrontery.

Brinkley Morton

Constitutional Law—Conviction for Refusal to Testify before Un-American Activities Committee

The defendant was indicted, tried, and found guilty[1] of refusing to testify before a sub-committee of the House Un-American Activities Committee in violation of a federal statute[2] which reads: "Every person who having been summoned as a witness by the authority of either House of Congress . . . or any committee . . . willfully makes default, or who having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, . . ." He appeared before the sub-committee in response to a summons, but refused either to be sworn or answer any question of whatever nature. He appealed, and the conviction was affirmed. *United States v. Josephson,* 165 F.2d 82 (C.C.A. 2d 1947), *cert. denied* 68 Sup. Ct. 609, 731 (1948).

The statute[3] alone does not set up specifically what is the criminal act. There must be read with it the terms of the authorizing resolution. The Committee on Un-American Activities was created by 60 Stat. 812 (1946) and adopted into the House Rules of the 80th Congress by House Resolution 5, 80th Congress, dated January 3, 1947. By omitting the willful default part of the penal statute (with which the defendant is not charged) and substituting the provisions of the authorizing resolution into it, the conduct that is declared to be a misdemeanor can be much more readily seen. Such a substituted version follows: "Every person who, having been summoned as a witness by the authority of the House of Representatives to give testimony upon any matter under inquiry by the Committee on Un-American Activities, refuses to answer any question pertinent to an investigation of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our constitution, or (iii) any other questions in relation thereto that would aid Congress in any necessary remedial legislation, shall be guilty of a misdemeanor. . ." From this combination of the two statutes it can be seen that (1) refusal to answer (2) questions pertinent to an investigation of un-American activities and propaganda while being examined by (3) a committee authorized by the House of Representatives to investigate matters of which the House has constitutional authority to investigate, are the three elements of the misdemeanor created by the penal statute.

The undenied refusal of the defendant to testify at all made out the first element.

Under so broad a grant of power, what is or is not a relevant question is conceded to be an extremely difficult problem. Indeed it may prove to be an insurmountable obstacle to the enforcement of this statute in some cases. If it is found that the con-

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[1] 74 F. Supp. 958 (S.D. N.Y. 1947).
[2] Rev. Stat. § 102 (1878), as amended, 52 Stat. 942, 2 U.S.C.A. § 192.
[3] *Ibid.*

gressional grant of power is so broad and undefined that the court cannot tell the purpose or meaning of the authority given the committee, it cannot be enforced.[4] But the defendant did not, nor does the court, have to interpret the purpose and meaning of the grant of authority, for in refusing to answer *all* questions he challenged the authority of this committee to examine him for any purpose, defined or undefined. This absolute refusal to testify obviously includes a refusal to answer pertinent questions as well as those that might be irrelevant. So the second element is made out against him.[5]

The remaining question to be answered is whether or not the House of Representatives had the constitutional authority to investigate un-American activities as described in the authorizing statute.[6]

That Congress has the power to gather information generally by investigation has often been held. The Supreme Court summed up its four previous decisions[7] and numerous state court decisions[8] on the matter in *McGrain v. Daugherty*[9] by saying: "We are of opinion that the power of inquiry . . . is an essential appropriate auxiliary to the legislative function. . . A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change . . . so some means of compulsion are essential to obtain what [information] is needed." This position was reaffirmed in *Sinclair v. United States*[10] and *Jurney v. MacCracken.*[11]

Since the *McGrain* case[12] inferior federal courts have five times[13] held that Congress may conduct investigations to obtain information.

While all of the above cited Supreme Court cases hold that Congress can make investigations to obtain information, four[14] hold that these investigations must be limited to matters over which Congress has authority to act. The substance of these cases is summed up in the *Sinclair* case:[15] It is that Congress cannot pry into the religious, political and other private beliefs of the citizen that are protected by the First Amendment, but it can investigate matters over which it may legislate and inquire into those subjects over which the Constitution has given it jurisdiction.

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[4]*See* United States v. Josephson, 165 F.2d 82, 96-97 (C.C.A.2d 1947) (Dissenting opinion).

[5]*Id.* at 87 and 88.

[6]60 STAT. 812 (1946), and House Resolution 5, 80th Congress, Jan. 3, 1947.

[7]*In re* Chapman, 166 U S. 661 (1897); Kilbourn v. Thompson, 103 U.S. 168 (1881); Anderson v. Dunne, 19 U.S. 204 (1821); *See* Marshall v. Gordon, 243 U.S. 521, 545 (1917).

[8]*E.g.,* Burnham v. Morrissey, 14 Gray 226, 239 (Mass. 1859); Wilckens v. Willet, 1 Keyes 521, 525 (N.Y. 1864); People v. Keeler, 99 N.Y 463, 2 N.E. 615 (1885); State v. Frear, 138 Wis. 173, 119 N.W. 894 (1909).

[9]273 U.S. 135 (1927).

[10]279 U.S. 263, 291 (1929).

[11]294 U.S 125 (1935).

[12]*Supra* note 9.

[13]Townsend v. United States, 95 F.2d 352 (App. D.C. 1938); Seymour v. United States, 77 F.2d 577 (C.C.A. 8th 1935); United States v. Creech, 21 F. Supp. 439 (D.C D.C. 1937); United States v. Bryan, 72 F. Supp. 58 (D.C. D.C. 1947); United States v. Dennis, 72 F. Supp. 447 (D.C. D.C. 1947).

[14]Kilbourn v. Thompson, *supra* note 7; *In re* Chapman, *supra* note 7; Marshall v. Gordon, *supra* note 7; Sinclair v. United States, *supra* note 10; Jurney *v.* MacCracken, *supra* note 11.

[15]*Supra* note 10.

The question is whether Congress has the power to investigate matters regarding subversive and un-American activities, propaganda instigated in foreign lands, and propaganda of domestic origin that attacks the principle of our government. Since Congress has the duty to provide for the common defense,[16] protect against domestic violence,[17] and guarantee to every state a republican form of government,[18] it is imperative that Congress be given the power to investigate such activities and those who the committee thinks can throw light on them. Therefore, all the elements of the alleged misdemeanor would seem to be present in the conduct of the defendant.

Dale H. McKibben

Constitutional Law—Due Process—Failure to Conform to Procedural Rules

Defendant was indicted and convicted of larceny by the trial court in Hawaii. On appeal to the Supreme Court of Hawaii defendant's assignment of error failed to conform to certain procedural rules requiring an itemized statement of errors relied upon. The appeal was dismissed for the lack of conformity, and defendant appealed to the Circuit Court of Appeals for the Ninth Circuit contending that he was denied due process of law by failure of the Hawaiian Supreme Court to judge case on its merits. Held: Enforcement of the Hawaiian procedural rule was not "manifestly erroneous" and did not deprive the defendant of due process of law. *Meyer v. Territory of Hawaii,* 164 F.2d 845 (C. C. A. 9th 1947), *cert. denied,* 68 Sup. Ct. 738 (1948).

The essential elements of procedural due process are notice and an opportunity to be heard.[1] The due process clause does not require the states and territories to enact an ideal procedure in dispensing with controversies[2], but on the other hand the mode of adjudication cannot be a procedural morass offering no substantial hope of relief.[3] At some point between these two extremes the present case lies.

It is a well settled rule that an appellate review is not an essential requisite to due process of law, but is only a matter of grace.[4] However where such an appeal is provided for, and the prisoner has had the benefit of it, the proceedings in the appellate tribunal are to be regarded as a part of the process of law under which he is held in custody by the state.[5] Thus, the rule of the Hawaiian court governing procedure on appeal must be considered in determining the question of whether or not the defendant has been afforded due process.

The Federal government has set forth certain procedural regulations giving the Circuit Court of Appeals appellate jurisdiction over the Territory of Hawaii in all

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[16]U.S Const. Art. I, § 8.
[17]U.S. Const. Art. IV, § 4.
[18]*Ibid.*

[1]Powell v. Alabama, 287 U.S. 45 (1932); Snyder v. Mass., 291 U.S. 97 (1934); Twining v. New Jersey, 211 U.S. 78 (1908); Ballard v. Hunter, 204 U.S. 241 (1907).
[2]Ownbey v. Morgan, 256 U.S. 94 (1921).
[3]Marino v. Rogan, 68 Sup. Ct. 240 (1947).
[4]McKane v. Durston, 153 U.S. 684, 687 (1894); Andrews v. Swartz, 156 U.S. 272, 275 (1895); Kohl v. Lehlback, 160 U.S. 293, 297, 299 (1895); Reetz v. Michigan, 188 U.S. 505, 508 (1903); The Francis Wright, 105 U.S. 381, 386 (1882); Montana Co. v. St. Louis Min. & Mill Co., 152 U.S. 160, 171 (1894).
[5]Frank v. Mangum, 237 U.S. 309, 327 (1914).

cases wherein the Constitution of the United States is involved.[6] But it is the practice of the Circuit Court of Appeals to allow the territorial courts to declare the law of the territories with the least possible interference. The same arguments of policy apply with respect to territorial courts as also apply in allowing the state courts to declare the law of the state.[7]

Therefore, unless the enforcement of a procedural rule will deny a litigant the opportunity for a fair trial the Circuit Court of Appeals should not disturb the ruling of the Territorial Court.

Similar situations to the principal case have arisen many times in the state and federal courts in which it has been held that due process of law was afforded: In *Decker v. State*[8] an assignment of error was declared faulty because the objections to the testimony were not clearly pointed out; in *Muyres v. United States*[9] the alleged errors in the instructions were not specified; in *People v. Clayton*[10] the appellant failed to make a formal statement of the errors; in *Mo. K. & T. Ry. Co. v. Kidd*[11] the litigant did not file its brief until nearly three years after the time limit set forth by the rule of procedure; and in *Sovereign Camp of the Woodmen of the World v. Jackson*[12] the assignment of error was too vague and stated in effect only that the decree was erroneously entered for the wrong party. So far as procedural rules help to expedite litigation, enforcement of the rules should not be considered a violation of procedural due process.

Thus it may be concluded that the instant case is an additional authority for the postulate that each individual may exercise and enjoy certain inherent and fundamental rights, but it is not an infringement upon these rights for tribunals to require a reasonable mode of adjudication in the protection of such rights.

W. F. Riley

Constitutional Law—Indefinite And Uncertain Statute Held To Contravene Fourteenth Amendment

Appellant, a bookdealer, was convicted of having in his possession with intent to sell certain magazines charged to violate a New York statute[1] which made it a misdemeanor for any person to print, etc. any book, printed paper, etc. devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of such deeds or crimes. The New York

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[6]The Circuit Court of Appeals shall have appellate jurisdiction to review by appeal or writ of error final decisions: In the Supreme Courts of the Territory of Hawaii and of Porto Rico, in all civil cases, civil or criminal, wherein the Constitution or a statute or treaty of the United States or any authority exercised thereunder is involved; in all other civil cases wherein the value in controversy, exclusive of interest and costs, exceeds $5,000, and in all habeas corpus proceedings. 26 Stat. 828 (1891), as amended 28 U.S.C.A. § 225 (1943).

[7]Waialua Agr. Co. v. Christian, 59 Sup. Ct. 21 (1938), reversing Christian v Waialua Agr. Co., 93 F.2d 603 (C.C.A. 9th 1937), rehearing den. 94 F.2d 806 (C.C.A. 9th 1938), cert. granted 304 U.S. 553 (1938).

[8]58 Okla Cr. App. 445, 54 P.2d 1096 (1936).

[9]89 F.2d 783 (C.C.A. 9th 1937).

[10]292 Ill. App. 647, 10 N. E.2d 971 (1937).

[11]146 F. 499, 500 (C.C.A. 8th 1906).

[12]97 F. 382, 385 (C.C.A. 8th 1899).

[1]N.Y. Penal Law, Consol. Laws, c.40, § 1141, subsec. 2.

Court of Appeals interpreted the statute as prohibiting the *massing* of stories, etc. of bloodshed and lust *in such a way* as to *incite* violent and depraved crimes against the person.[2] HELD: The statute, as interpreted by the state court, was so uncertain and indefinite as to contravene the Fourteenth Amendment and, therefore, was void. *Winters v. People of State of New York,* 68 Sup.Ct. 665 (1948).

The terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties; and a statute, which, on its face, and as authoritatively construed,[3] either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.[4] The criminal code must be definite and informative[5]

The Supreme Court of the United States has upheld statutes as being sufficiently certain (1) when they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach correctly to apply them[6]; (2) when the terms of the statutes had a well-settled common law meaning, notwithstanding an element of degree in definition as to which estimates might differ[7]; or (3) when for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded.[8] Thus the Sherman Anti-trust Act, making unlawful any conspiracy in "restraint of trade", has been held to be sufficiently certain[9]; but a state statute, construed by the state court as making unlawful any combination for the purpose of controlling prices with the effect of fixing a price that was greater or less than the "real value" of the article, was held to be void for vagueness.[10] And a statute making "any attempt . . . to induce others to join in any combined resistance to the lawful authority of the State . . ." an attempt to incite insurrection, was held void as not being sufficiently specific.[11] But where the state court had interpreted a statute punishing the circulation of publications "having a tendency to encourage or incite the commission of any crime", as being confined to publications encouraging an actual breach of the law, the court sustained the validity of the statute as thus interpreted.[12]

Invalidation of a state statute by the Supreme Court of the United States because of vagueness or indefiniteness seems necessarily to rest on the ground that such

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[2]People v. Winters, 294 N.Y. 545, 63 N.E.2d 98 (1945).

[3]Stromberg v. People of State of California. 283 U.S. 359 (1930); Fox v. Washington, 236 U.S. 273 (1948).

[4]Connally, Commissioner of Labor of Oklahoma v. General Const. Co., 269 U.S. 385 (1926); International Harvester Co. v. Kentucky, 234 U.S. 216 (1913); Collins v. Kentucky, 234 U.S. 634 (1913).

[5]State v. Klapprott, 127 N.J.L. 395, 22 A.2d 877 (1941).

[6]Hygrade Provision Co. v. Sherman, 266 U.S. 497 (1924); Omaechevarria v. Idaho, 246 U.S. 343 (1917).

[7]Mr. Justice Holmes in Nash v. U.S., 229 U.S. 373 (1912), notwithstanding Mr. Justice Brewer to the contrary in Tozer v. U.S., 4 Inters. Com. Rep. 245, 52 Fed. 917 (1892). Compare International Harvester Co. v. Kentucky, *supra* note 4, Mr. Justice Holmes also giving the opinion.

[8]U.S. v. Cohen Grocery Co., 255 U.S. 81 (1920); Waters-Pierce Oil Co. v. Texas, 212 U.S. 86 (1908); Nash v. U.S., *supra* note 7; Fox v. Washington, *supra* note 3; Miller v. Strahl, 239 U.S. 426 (1915); Omaechevarria v. Idaho, *supra* note 6.

[9]Nash v. U.S., *supra* note 7.

[10]International Harvester Co. v. Kentucky, *supra* note 4.

[11]Herndon v. Lowry, 301 U.S. 242 (1936).

[12]Fox v. Washington, *supra* note 3. For illustrations as to when a statute is subject to attack as vague, indefinite, or uncertain, compare 86 L.Ed., pp. 893-922.

statute contravenes the due process clause of the Fourteenth Amendment.[13] Vague Federal statutes have been held void as violating the Fifth and Sixth Amendments,[14] as being a delegation of the legislative power to the courts,[15] or as violating the common law concept that crimes must be defined with appropriate definiteness.[16] And state statutes, similar in character, have been held void by state courts for uncertainty, with no reference being made as to their unconstitutionality.[17] There being, in the principal case, a state statute involved, the court said that there was a violation of the due process clause of the Fourteenth Amendment.

Mr. Justice Frankfurter, dissenting, did not think that the statute in question constituted such a deprivation of the liberty of the press. He asks the question: "What real risk do the Conan Doyles, the Edgar Allan Poes, the William Roughheads, . . . run?" But no satisfactory answer is given to this question. Probably the older and more renowned writers would not suffer because of a statute of this kind, due to the prestige that time and history have given them. Nevertheless, it would seem that such a statute would act as a deterrent to younger and less known authors, if, indeed, they were not snared into the statute's net.

Abuse of freedom of speech is subject to punishment by the State;[18] and, undoubtedly the legislatures and Congress have a difficult task in drafting statutes, which, on the one hand, are not so narrow and definitive as to be easily circumvented, and, on the other, are not so broad or uncertain as to contravene "due process".[19] Nevertheless, it is submitted that the court was justified in refusing to uphold a statute which might well abridge the liberty of the press on the admittedly conjectural premise[20] that certain articles, books, etc. could be "so massed" as to "incite" crime.

W. Byron Long

Damages—Amount Allowable for Demolished Automobile

Defendant's negligence caused a collision between his and plaintiff's automobile, in which planitiff's wife was killed and plaintiff's automobile demolished. In a tort action, brought by plaintiff to recover damages for the death of his wife and the destruction of his automobile, defendant offered to show that the Office of Price Administration ceiling price for the same model automobile as plaintiff's was less than the damages thereto claimed by him. Plaintiff objected to this proof. Held: Office of Price Administration ceiling prices were not intended to limit the amount

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[13]Aigler, *Legislation In Vague Or General Terms,* 21 Mich. L. Rev. 831 (1923).

[14]U.S. v. Cohen Grocery Co., *supra* note 8; U.S. v. Capital Traction Co., 34 App. D.C. 592 (1910). For illustration of the conflicting results reached by different judges in seeking to carry out the Lever Act, declared void for uncertainty, see the statement appended to the margin of U.S. v. Cohen Grocery Co., *supra* note 8.

[15]U.S. v. Reese, 92 U.S. 214 (1895); Czarra v. Board of Medical Examiners, 25 App. D.C. 443 (1905).

[16]Pierce v. U.S., 314 U.S. 306 (1941).

[17]Patton v. Aluminum Castings Co., 105 Ohio St. 1, 136 N.E. 426 (1922). The statute in question in that case was declared void for uncertainty by a 4-3 decision, the Constitution of Ohio requiring at least a 6-1 decision in order to declare an act unconstitutional. Ohio Const., as amended in 1912, Art. IV, § 2. Augustine v. State, 41 Texas Cr. R. 59, 52 S.W. 77 (1899). Compare State v. Klapprott, *supra* note 5, where a statute was held unconstitutional and *also* for uncertainty.

[18]Gitlow v. People of N.P., 268 U.S. 652 (1924).

[19]See Freund, *The Use Of Indefinite Terms In Statutes,* 30 Yale L. J. 437 (1921), for a discussion of this problem.

[20]See dissent to principal case 68 Sup.Ct., pp. 675, 676.

recoverable against a wrongdoer for destruction of or injury to property. *Mattfeld v. Nester,* 32 N.W.2d 291 (Minn. 1948).

The purpose of the courts in awarding damages in a tort action for the destruction of property, is to put the wronged party in substantially the same financial position as he was before the wrongful act.[1]

When an automobile has been demolished the courts have attempted to award damages in an amount sufficient to purchase a similar automobile. The general rule is that a plaintiff should be awarded the *reasonable market value* of his automobile before its destruction by the defendant,[2] and in no case should the damages, in the case of a non-commercial or pleasure vehicle, exceed the market value.[3]

Because of the scarcity of automobiles during the recent war the courts have been confused as to what amount of damages is necessary to provide the plaintiff with sufficient funds to purchase a similar automobile.

The general intent of Congress in the passing of the Emergency Price Control Act of 1942,[4] which provided for the creation of the Office of Price Administration, was to prevent inflation[5] by establishing a ceiling price on rents, wages, and certain commodities.

In awarding damages, it might seem that the logical thing for the courts to do in following the *reasonable market value* rule to determine the value of an automobile which has been destroyed, would be to accept the O.P.A. ceiling price as the "value" of the automobile, and limit the amount of damages recoverable to that amount. However, the courts have refused to limit the amount of damages a plaintiff could recover to the O.P.A. ceiling price.[6] Their reasons for not setting the O.P.A. ceiling price as a limiting guide have been listed: first, the intent of Congress in creating O.P.A. was to prevent inflation by controlling the selling price of the commodities, and the act must be strictly construed to exclude everything else; second, the O.P.A.

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[1]RESTATEMENT, TORTS, § 903, comment a (1938); MCCORMACK, DAMAGES, § 137 (1935) "The general purpose of compensation is to give a sum of money to the person wronged which as nearly as possible, will restore him to the position he would be in if the wrong had not been committed."

[2]See cases collected in 6 BLASHFIELD'S CYCLOPEDIA OF AUTOMOTIVE LAW AND PRACTICE, § 3411-3440 (1934) and supplement (1948); 17-18 HUDDY, CYCLOPEDIA OF AUTOMOBILE LAW, § 251 (1932) and supplement (1948); also, 32 A.L.R. 711 (1924), 78 A.L.R. 917 (1932), 169 A.L.R. 1100 (1947).

[3]Goss v. Agate Ice Cream, Inc., 264 N.Y. 141, 190 N.W. 323 (1934); Missouri Pac. Ry. Co. v. Qualls, 120 Okl. 49, 250 Pac. 744 (1926).

[4]56STAT. 23 (1942), 50 U.S.C.A. § 901-946 (1944).

[5]Bowles, Adm'r of Price v. Texas Liquor Control Board, 148 F.2d 265 (C.C.A. 5th 1945).

[6]Southern Ry. Co. v. Farmer, 74 Ga. App. 329, 39 S.E.2d 714 (1946); Ross Product Co. v. Thompson, 236 Iowa 863, 20 N.W. 2d 57 (1945); Louisville & N. Ry. Co. v. Blanton, 304 Ky. 127, 200 S.W.2d 133 (1947); Betts v. Hitcsack, 197 S.W.2d 878 (Tex. Civ. App. 1946); *cf.* Connecticut Fire Ins. Co. of Hartford, Conn. v. Youngblood, 187 P.2d 792 (Okl. 1947); Roger v. Deihl, 55 A.2d 722 (D.C. Mun.App. 1947); Tierney v. General Exchange Ins. Corp., 60 F. Supp. 331 (D.C. Tex. 1945); Sun Ins. Office v. Rupp, 64 F. Supp. 533 (D.C. Mo. 1946), holding that O.P.A. ceiling prices do not control in settlements of losses covered by insurance policies; *cf.* Zemel v. Commercial Warehouse, 132 N.J.L. 341, 40 A.2d 642 (1945); Bowles, Adm'r of Price v. Brannagan, 60 F. Supp. 897 (D.C. Neb. 1945); Fugate v. State, 158 P.2d 177 (Okl. Crim. 1945), holding that O.P.A. ceiling prices do not control in cases of conversion or larceny.

ceiling prices apply only to *sales,* as defined in the act;[7] third, while the general rule is that the plaintiff may recover the reasonable market value, the rule should not apply when the market is not a free competitive market; and fourth, to award the O.P.A. ceiling price when an automobile has been destroyed would not restore the plaintiff to his original status, his automobile having a greater intrinsic value than the O.P.A. ceiling price.[8]

Since the general rule for awarding damages is the *reasonable market value,* how have the courts arrived at the amount to award? It is common knowledge that during the war there existed a so called "black market" on which automobiles were bought and sold above the O.P.A. ceiling price. The courts have refused to accept the "black market value" as the correct amount to allow in a tort action for the destruction of an automobile, even though in many cases the "black market value" would be the amount required to purchase a similar automobile.[9] Their reasons for not accepting the "black market value" as the amount to award are that the "black market" is illegal, and, moreover, is not a free competitive market.[10]

The courts have not changed the general rule that the amount recoverable is the *reasonable market value* but have simply held that the O.P.A. ceiling price does not represent the *reasonable* market value. To the courts that have been confronted with this problem and followed the logic of the leading case in point, *Ross Product Company v. Thompson,*[11] the *reasonable market value* is the same as the *actual* or *intrinsic* value. They have thus arrived at the measure of damages, taking into consideration age, cost, depreciation, and finally the value the automobile would have on a free competitive market, not affected by O.P.A. ceiling price.

While there have been few cases decided on this point, it seems that the courts have properly refused to limit the amount recoverable to the O.P.A. ceiling price because that amount in many cases does not in fact put the plaintiff in the same financial position he was in before the wrongful act was committed.

Paul G. Alexander

Emblements—Whether Matured Crops Pass with Realty in a Sale

X conveyed to Y by warranty deed without reservations a parcel of land on which stood an unharvested crop of matured corn. Y sold such corn and X brings suit to recover the amount received for the corn. Held: Recovery allowed. A matured but unharvested crop of corn, standing upon land at the time of a conveyance of title to the land by warranty deed without reservations, possesses the character of personalty and does not pass with the title to the land. *Wood v. Wood,* 183 P.2d 889 (Colo. 1947).

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[7]56 Stat. 23 (1942), 50 U.S.C.A. § 942 (1944).
[8]See note 7 *supra.*
[9]Ross Product Co. v. Thompson, *supra* note 7.
[10]*Ibid.*
[11]236 Iowa 863, 20 N.W.2d 57 (1945).

There are two views in common law courts as to whether rights to growing crops[1] pass with a conveyance of title to the realty upon which they stand. Growing crops were construed by many courts to be those crops which were still attached to the land,[2] and the majority held that title thereto passed with the title of the land, whether the crop was ripe or unripe, where no reservation of such crop was made by the vendor.[3] This rule was founded upon several points of reasoning: (1) If title to the crop did not pass with the conveyance of the realty, then the vendor who planted and nurtured the crop would commit a trespass in reentering the land to harvest the ripened crop;[4] (2) a deed is construed strongest against the grantor, and his intent to pass title to the crop is presumed unless reserved;[5] (3) if maturity of the crop is the deciding factor rather than whether the crop has been severed from the soil, then innumerable arguments would arise as to the stage of growth of such crop.[6] While these are not the only considerations, they appear to be the major ones.[7]

The opposing view is that the crop, upon reaching maturity, becomes personalty and does not pass to the vendee in a sale of the realty. The reasoning followed by this group of courts is that the crop, when matured, has no further need of the land; the crop draws no sustenance from the soil, and the entire relation of crop to land has become changed. The land, in short, has become a mere storage place, a warehouse, upon which the crop rests until harvested.[8]

In those jurisdictions applying the severance test, it is generally held that the severance may be actual or constructive.[9] Constructive severance is accomplished by a mortgage on the crop, a lien thereon, or by sale of the crop prior to the sale of the realty. A reservation of the crop in the conveyance of the realty acts to give the crop the nature of personalty, and is generally accomplished by an express reservation

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[1]We are concerned here with crops designated as *fructus industriales* (those requiring yearly planting and much husbandry, as corn or cotton) as distinguished from those designated *fructus naturales* (resulting from a perennial root and requiring no husbandry, as wild berries or wild grasses). 25 C.J.S. 4, 5.

[2]Wootton v. White, 90 Md. 64, 44 A. 1026 (1899); Farmer's Warehouse Co. v First National Bank, 152 Ga. 262, 109 S.E. 900 (1921); Chicago Joint Stock Land Bank v. McCambridge, 343 Ill. 456, 175 N.E. 834 (1931); Tripp v. Hasceig, 20 Mich. 254, 4 Am. Rep. 388 (1870). . . . "It is true that the authorities in alluding to this subject very generally use the words growing crops, as those embraced by a conveyance of the land, but this expression appears to have been commonly employed to distinguish crops still attached to the ground, rather than to mark any distinction between ripe and unripe crops. . ."

[3]Tripp v. Hasceig, *supra* note 2; Reily v. Carter, 75 Miss. 798, 23 So. 435 (1898); Firebaugh v Divan, 207 Ill. 287, 69 N.E. 924 (1904); Gam v. Cordrey, 4 Pa. 143, 53 A. 334 (1902); Newton County v. Boyd, 148 Ga. 761, 98 S.E. 347 (1919); *see* note, 172 A.L.R. 816.

[4]Herron v. Herron, 47 Ohio St. 544, 25 N.E. 420 (1890).

[5]Meyers v. Steele, 98 Kan. 577. 158 P. 660 (1916); 15 Am. Jur. 204.

[6]*In re* Andersen, 83 Neb. 8, 118 N.W. 1108 (1908).

[7]A discussion of the above and other reasons may be found in 8 R.C.L. 358.

[8]First National Bank v. Beegle, 52 Kan. 709, 35 P. 814 (1894); Foss v. Marr, 40 Neb. 559, 59 N.W. 122 (1894); Tolland Co. v. First State Bank of Keenesburg, 95 Colo. 321, 35 P.2d 867 (1934); Hecht v. Dittman, 56 Iowa 679, 7 N.W. 495, 10 N.W. 241 (1881); Meyers v. Steele, 98 Kan. 577, 158 P. 660 (1916).

[9]Hayward v. Poindexter, 206 Mo. App. 398, 229 S.W. 256 (1921); Miethke v. Pierce County, 173 Wash. 381, 23 P.2d 405 (1933); Farmers' Bank of Mt. Vernon v. Parker, 245 S.W. 586, (Tex. Civ. App., 1922); 17 C.J. 379, note 7(a).

made in the instrument of conveyance.[10] Generally, a parol agreement prior to the conveyance of title to the land is not a valid reservation.[11]

In Mississippi, the rule of severance formerly prevailed,[12] but subsequent cases indicate a change to the maturity test.[13] There is, furthermore, a statute in this state which gives the vendor in case of forfeiture and mortgagor in case of foreclosure the right of ingress and egress, upon payment of fair compensation, for the purpose of gathering crops planted prior to sale or foreclosure.[14] While there are no cases involving a vendor-vendee situation such as found in the principal case, it appears that the statute would not be broad enough to cover such a case, and further that the maturity test would control in this state.

Wayne G. Williams

EMINENT DOMAIN—MINES AND MINERALS—EXTENT OF PROPERTY INTEREST TAKEN BY HIGHWAY COMMISSION

State Highway Commission brought suit to cancel claims of defendants to mineral rights under land acquired from defendants for highway purposes. Commission purchased right of way under statutory authority "to acquire by gift, purchase, condemnation or otherwise, land or other property whatsoever that may be necessary for a state highway system."[1] There was no specific provision in the purchase deed with reference to the mineral rights, although the deed purported to convey the fee. The grantor signed it, however, with the understanding that he was conveying only an easement. HELD: Commission acquired no more than a right of way or easement, and

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[10]*See* 25 C.J.S. 8, discussing reservation of crops.

[11]Adams v. Watkins, 103 Mich. 431, 61 N.W. 774 (1895); Kammrath v. Kidd, 89 Minn. 380, 95 N.W. 213 (1903); BROWN, PERSONAL PROPERTY, p. 694 *et. seq.*, (1936), says: "These courts treat growing crops as part of the soil for conveyancing purposes, and hold that the admission of such parol reservations would infringe the elemental rule that forbids the admission of parol evidence to vary or contradict the legal effect of a written instrument. Moreover, it has been stated that because the crop is a part of the land, such parol reservation is void under that section of the Statute of Frauds, which required that contracts for the sale of an interest in land must be in writing." *See* 37 C.J.S. 600.

[12]The Planters Bank v. Walker, 11 Miss. 409 (1844); Reily v. Carter, 75 Miss. 798, 23 So. 435 (1898).

[13]Wood v. Pace, 164 Miss. 187, 143 So. 471 (1932); Opperman v. Littlejohn, 98 Miss. 636, 54 So. 77 (1911).

[14]"In case of forfeiture under contract of purchase, the purchaser, and in case of foreclosure of deeds in trust or mortgages, the mortgagor shall be entitled to cultivate and gather the crops, if any, planted by him and grown or growing on the premises at the time of the commencement of the suit; and shall, after eviction therefrom, have the right to enter thereon for the purpose of completing the cultivation and removing the crops, first paying or tendering to the party entitled to the possession a reasonable compensation for the use of the land. The court may, on demand of the defendent, adjudge the sum to be paid or tendered." Wood v. Pace, *supra* note 13.

[1]MISS. CODE ANN. § 8038 (1942). This section has since been repealed, and the following specific provision written into the law: "The estate which the state highway commission is authorized to acquire by deed or condemnation as set forth above shall include all rights, title, and interest in and to the lands and property being acquired excepting and excluding all the oil and gas therein or thereunder, and such other rights, title or interest which are expressly excepted and reserved to the property owner, his successors, heirs or assigns in the deed or condemnation petition by which the property is acquired. . . ." Advance Sheet 8, General Acts of Miss. 1948, H.B. No. 364, p. 38.

title to minerals remained in the original londowner. *Whitworth v. Mississippi State Highway Commission, on suggestion of error,* 33 So.2d 612 (Miss. 1948).

This case involved the crystal-ball proposition of statutory interpretation, and the Mississippi Court endeavored here to look into the legislative mind and ascertain the extent of the state's power to acquire land for road-building purposes. That authority must necessarily be set forth in the statutes.[2] But where, as in the instant case, the authority is not made definite, the legislative intent must be garnered from a strict but reasonable interpretation of the statute and from relevant facts and circumstances.[3]

It is no longer a contested axiom that in construing a conveyance between individuals the courts will hold that the grantee acquires the greatest possible estate in the interest conveyed,[4] but that rule does not apply in determining the extent of eminent domain acquisitions. In those proceedings the almost universally adopted view is to construe the statute so as to leave the largest possible estate in the landowner or grantor.[5] Obviously the reasoning behind such an interpretation stems from the fact that the power of eminent domain is in derogation of the common right to hold property,[6] and reflects also the natural inclination of courts and juries to keep to a minimum the state's interests in realty.

In cases involving the acquisition by the government of lands for public use, the position adopted in the vast majority of jurisdictions is that, in the absence of specific statutory authority as to the estate which is to be acquired, the state gains only that interest which is reasonably necessary to the public use.[7] This is the common law holding.[8] The same rule applies to eminent domain-acquired land held by public service corporations.[9] In a few courts the state's interest has been made paramount, and condemnation proceedings have acquired the fee, even where the statute was silent.[10] On the other hand, at least one court has gone so far as to declare uncon-

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[2]Downing v. State, 214 Ala. 199, 107 So. 80 (1925); United States v. Southern Power Co., 31 F.2d 852 (C.C.A. 4th 1929).

[3]Conners v. New Haven, 101 Conn. 191, 125 A. 375 (1924); Davis v. Board of Education of Anne Arundel County, 166 Md. 118, 170 A. 590 (1934); State Highway Dep't v. Mitchell's Heirs, 142 Tenn. 58, 216 S.W. 336 (1919); SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 6504 (1943).

[4]Yazoo & M. V. R.R. v. Lakeview Traction Co., 100 Miss. 281, 56 So. 393 (1911); American Unitarian Ass'n v. Minot, 185 Mass. 589, 71 N.E. 551 (1904); Jenkins v. Ellis, 111 Ark. 220, 163 S.W. 524 (1914); PATTON, LAND TITLES § 124 (1938).

[5]Mott v. Eno, 181 N.Y. 346, 74 N.E. 229 (1905); Hays v. Walnut Creek Oil Co., 75 W.Va. 263, 83 S.E. 900 (1914); ELLIOTT, ROADS AND STREETS § 254 (3d ed. 1911).

[6]Ferguson v. Board of Supervisors, 149 Miss. 623, 115 So. 779 (1928); Maine-New Hampshire Interstate Bridge Authority v. Ham, 91 N.H. 179, 16 A.2d 362 (1940); State *ex rel* Cranfill v. Smith, 330 Mo. 252, 48 S.W.2d 891 (1932).

[7]Frelinghuysen v. State Highway Comm'n, 107 N.J.Law 218, 152 A. 79 (1930), aff'd, 108 N.J.Law 403, 158 A. 465 (1932); Dantzler v. Miss. State Highway Comm'n, 190 Miss. 137, 199 So. 367 (1941); City of Greenwood v. Gwin, 153 Miss. 517, 121 So. 160 (1929).

[8]Barclay v. Howell, 6 Pet. 498 (U.S. 1829).

[9]Hays v. Walnut Creek Oil Co., *supra* note 5; Currie v. New York Transit Co., 66 N.J.Eq. 313, 58 A. 308 (1904).

[10]Crockett Land & Cattle Co. v. American Toll Bridge Co., 211 Cal. 361, 295 P. 328 (1931); Laramie Valley Ry. v. Gradert, 43 Wyo. 268, 3 P.2d 88 (1931).

stitutional a statute requiring the taking by the state of a fee where a lesser estate would suffice.[11] Another state holds that where the law expressly forbids the acquiring of a fee, it cannot be said to be acquired by implied dedication.[12] It thus seems to be the general rule that, without express stipulations in the statutes, the state never acquires more than an easement or right of way, except in those cases where the landowner, voluntarily and with full understanding of the significance of his act, specifically conveys the fee simple title in the land to the state.[13]

Where the state procures only an easement in lands for road-building purposes, the owner of the fee retains the right to utilize any part of the estate not inconsistent nor interfering with the state's use.[14] Thus, the fee-holder has the right to keep and develop the oil and gas and all other mineral interests.[15] In addition, he holds title to the timber, water and springs, and the soil, rock, and gravel.[16] However, the state normally acquires, along with the easement, the right to use any and all materials such as gravel, earth, water, and grass needed in the actual construction of the road.[17] The state may neither sell nor dispose of any property which is not needed in road-building.[18]

In the instant case it is obvious that the need of the state in the building of its highways did not extend to the appropriation of the oil and gas beneath the surface. The legislative intent surely could not have been interpreted to demand such a result. The holding here is in accordance with the great weight of authority on this proposition, and in view of the state's rapidly increasing oil and gas production, the decision is of special significance. It should be acclaimed by those whose lands have been acquired for highway purposes. This case, coupled with the express provisions of House Bill 364,[19] should terminate all controversy on this question.

William F. Winter

Equity—Nuisances—Obstruction of Access to Plaintiff's Adjoining Business as Cause for Injunction

During noon and evening meals customers of defendant form lines on the sidewalk, frequently resulting in most of the entrances of complainant's drug store being practically closed to its customers for long periods of time. Plaintiff sued to enjoin the nuisance. Held: Defendant created the problem by utilizing its entire space for

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[11]Holcombe v. Western Union Telegraph Co., 109 N.J.Law 551, 162 A. 760 (1932); Wolf v. State Highway Comm'n, 110 N.J.Law 237, 164 A. 470 (1933).

[12]Hark v. Mountain Fork Hoe Co., 127 W.Va. 586, 34 S.E.2d 348 (1945).

[13]Cloverdale Homes v. Town of Cloverdale, 182 Ala. 419, 62 So. 712 (1913); Commonwealth v. Morrison, 197 Mass. 199, 83 N.E. 415 (1908).

[14]Gurnsey v. Northern Calif. Power Co., 160 Cal. 699, 117 P. 906 (1911); Holm v. Montgomery, 62 Wash. 398, 113 P. 1115 (1911); Yale University v. New Haven, 104 Conn. 610, 134 A. 268 (1926).

[15]Campbell v. Covington County, 161 Miss. 374, 137 So. 111 (1931); Breisch v. Locust Mountain Coal Co., 267 Pa. 546, 110 A. 242 (1920); Humble Oil & Refining Co. v. Wagener, 19 S.W.2d 457 (Tex. Civ. App. 1929).

[16]Campbell v. Covington County, *supra* note 15; State to Use of Stanton v. Junkin, 172 Miss. 225, 139 So. 107 (1935).

[17]State to Use of Stanton v. Junkin, *supra* note 16; Psota v. Sherman County, 124 Neb. 154, 245 N.W. 405 (1932).

[18]McNulty v. Lawley, 42 Cal. App. 747, 184 P. 50 (1919); Dist. of Columbia v. Robinson, 180 U.S. 92 (1901).

[19]*Supra,* note 1.

purposes of serving food; it cannot constantly make use of the public sidewalk as a waiting room to the special injury of the plaintiff. *Shamhart v. Morrison Cafeteria Co.*, 32 So.2d 727 (Fla., 1947).

A person, generally, has a right to use his own property for any lawful purpose, provided he does not deprive others of any right of enjoyment of their property which is recognized and protected by law, and his use is not such a one as the law will deem a nuisance.[1]

English cases on the subject have taken cognizance of the fact that a crowd on a street blocking entrance to a place of business may amount to a nuisance. Thus, the defendant who attracted crowds to his theater to await the opening of its doors was enjoined from this practice when access to plaintiff's shop was denied, and customers were prevented from coming there to trade.[2]

However, queues which are an evidence of fair play and orderliness were presented in *Dwyar v. Mansfield*,[3] where a greengrocery shop situated between the plaintiffs' shops, had queues form when foodstuffs were received. Owing to the post-war conditions of scarcity, the queues formed on either side of the entrance of the defendant's shop. The worst queues resulted from the period of potato shortage when the defendant rationed them, thus making the queues larger. The judge found as fact that the businesses of the plaintiffs had not been interfered with so as to constitute a nuisance, nor had they suffered any damage. The defendant had not by his conduct created the queues; they were caused by the potato shortage.

American courts have uniformly recognized that crowds may create nuisances. The attraction and detention of a crowd to view a puppet show held at intervals during the day materially impeding ingress and egress to and from complainant's store was enjoined.[4] A device placed on the wall of defendant's building which reproduced plays of the world series attracted such large crowds that plaintiff's display windows, directly across the street, were obstructed from view and entry to his store prohibited; the defendant was held liable for this practice.[5]

The problem presented in the subject case is rare in America. The defendant was utilizing its premises efficiently and completely and in no manner contributing

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[1]Panhandle Oil Co. v. Trigg, 148 Miss. 306, 114 So. 625 (1927); National Refining Co. v. Batte, 135 Miss. 819, 100 So. 388 (1924). A public nuisance is an act or omission which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all. A private individual may maintain an action to enjoin public nuisance only if he suffers special damage. Private nuisance is an unreasonable interference with an interest in the use and enjoyment of land. PROSSER, TORTS, §§ 72, 73 (1941).

[2]Lyons, Sons & Co. v. Gulliver, [1914] 1 Ch. 631; Barber v. Penley, [1893] 2 ch. 447. In the latter case during pendency of the suit defendant succeeded, through the employment of police, in controlling the crowd and keeping open a way of access to plaintiff's premises; thus, injunction was denied, but the court held that defendants were responsible to plaintiff for the crowd's interference with access to the plaintiff's premises.

[3][1946] 2 All E.R. 247. For an interesting discussion of this case which deals with the instant problem see 10 MOD L. REV. 313 (1947).

[4]Jacques v. National Exhibit Co., 15 Abb. N.C. 250 (N.Y. 1884).

[5]Shaw's Jewelry Shop v. New York Herald Co., 170 App. Div. 504, 156 N.Y. Supp. 651 (1915). See also 4 MCQUILLIN, MUNICIPAL CORPORATIONS, § 1489 (1934 Revision 1943).

directly to the nuisance. The only case which presents an identical problem, and in which an injunction was issued, is *Tushbant v. Greenfield's, Inc.*[6]

The dissents in the subject case and the *Tushbant* case are agreed that the regulation of traffic on the sidewalk and streets is for the municipality. Other observations by the dissenting justices are that the nuisance complained of is not occasioned by the defendant but by the public; the defendant's conduct is only the remote, not the proximate cause of the nuisance; when the nuisance exists, there is no business relationship between the defendant and the public. However, the majority in the principal case finds that there *is* a relationship between the public and the defendant sufficient to impose a duty on the defendant to prevent injury to the complainant.

The lower court in the *Shamhart* case dismissed the bill for injunction; the supreme court reversed the decree, indicating by implication that the injunction would be granted. It is submitted that the only way the customers could be reliably controlled is by the police; any efforts by the defendant would be wholly persuasive. Yet, where the authorities refuse to interfere, it seems that an injunction requiring the defendant to station an employee outside to urge cooperation is the most equitable solution.[7] Such a remedy was used in the *Tushbant* case. This is the most that the defendant can reasonably be expected to do, and at the same time allow him to continue to do business without undue interference by the court.

Arthur B. Custy

Federal Jurisdiction and Procedure—Constitutional Law—Jurisdiction in suits between Citizens of the District of Columbia and Citizens of a State

Suit was brought by a District of Columbia corporation against a Nebraska corporation in an Illinois court. Defendant had the suit removed to the federal district court on the ground of diversity of citizenship. After judgment for plaintiff, defendant appealed, claiming that the court did not have jurisdiction. Held: The district court did not have jurisdiction, for the statute[1] giving the federal courts jurisdiction of controversies between citizens of the District of Columbia and citizens of a state is unconstitutional. *Central States Co-op. v. Watson Bros. Transp. Co.*, 165 F.2d 392 (C.C.A. 7th 1947).

In 1804 in the case of *Hepburn v. Dundas and Ellzey*[2] the Supreme Court of the United States first decided that there was no federal diversity of citizenship

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[6]308 Mich. 626, 14 N.W.2d 520 (1944). This was a suit to enjoin the defendant from operating its restaurant business in such a manner as to cause its patrons to form a line-up in front of plaintiff's adjacent store. The court held that unobstructed entrance to plaintiff's store could readily be accomplished by defendant by means of an employee of defendant supervising the line-up of its customers.

[7]This alternative was adopted by the court in a subsequent opinion in this case. 35 So.2d 842 (1948). Upon remand after the former opinion the lower court issued a decree ordering defendant to provide ample space on its premises for waiting customers. Then another appeal was taken, the argument being that the decree would not allow defendant to station an employee outside its place to insure the sidewalk's being kept clear. The supreme court in the subsequent opinion affirmed the decree but modified it so as to allow the attendant to be used. The decree as modified simply enjoined defendant from blocking plaintiff's entrance.

[1]54 Stat. 143, 28 U.S.C.A. § 41 (1) (1940).
[2]2 Cranch 445, 2 L.Ed. 332 (1804).

jurisdiction in a suit between a citizen of the District of Columbia and a citizen of a state. At that time the judicial code provided that the district courts had jurisdiction of controversies between citizens of different states.[3] In order for there to be diversity it would thus have been necessary to consider the District of Columbia to be a state. The Court, speaking through Chief Justice Marshall, refused so to construe it, but held that only the commonwealths that had representation in Congress were states. The Court went on to say that this was an unjust situation, but the remedy was for legislative consideration, not judicial. The legislative branch did not change the law, and for 136 years the courts followed the *Hepburn* case.[4]

In 1933 the Supreme Court in *O'Donoghue v. United States*[5] held that the district court for the District of Columbia was a constitutional court. Since this court is authorized by the District of Columbia clause[6] of the Federal Constitution, the court hinted that there is judicial power not granted by the judiciary article[7] of the Constitution. In 1940 Congress amended the law to read: "The district courts shall have original jurisdiction as follows: First of all suits of a civil nature . . . where the matter in controversy . . . (b) is between citizens of different states, *or Citizens of the District of Columbia, The Territory of Hawaii, or Alaska, and any State or Territory* . . ."[8] (Amendment italicized). The principal case is brought pursuant to this statute.

Two district courts have held the statute constitutional.[9] Both courts cited the statement of Marshall in the *Hepburn* case to the effect that this was a matter for legislative consideration. In holding it valid both courts found constitutional authority for the amendment by combining the powers given Congress in the judiciary article with those in the District of Columbia clause. Both courts held that since Congress has the power to govern the District, it can allow the citizens thereof to sue in the federal courts on the ground of diversity of citizenship.

Seven district courts have held the amendment unconstitutional.[10] Each of these courts held that the judicial power of the United States is strictly confined to that contained in the Constitution, Article III, Section 2.[11] This article in plain words does not extend the judicial power to cases between a citizen of the District of Columbia and a citizen of a state. These courts further held that the clause authorizing Congress to govern the District does not give it authority to expand the Constitutional judicial power.

The amendment can be held constitutional only if the term "state" in the judiciary article of the Constitution includes the District of Columbia, or by holding that Article

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[3]*Ibid.*

[4]Winkler v. Daniels, 43 F. Supp. 265 (E.D. Va. 1942); Willis v. Dennis, 72 F. Supp. 853 (W.D. Va. 1947).

[5]289 U.S. 516 (1933).

[6]U.S. CONST. Art. I, § 8, Cl. 17.

[7]U.S. CONST. Art. III, § 2.

[8]54 STAT. 143, 28 U.S.C.A. § 41 (1) (1940).

[9]Glaeser v. Acacia Mut. Life Ass'n, 55 F. Supp. 925 (N.D. Calif. 1944); Winkler v. Daniels, *supra* note 4.

[10]Ostrow v. Samuel Brilliant Co., 66 F. Supp. 593 (D. C. Mass. 1946); Behlert v. Jones Foundation of N.Y., Inc., 60 F. Supp. 706 (S.D. N.Y. 1945); Wilson v. Guggenheim, 70 F. Supp. 417 (E.D. S.C. 1947); Freely v. Sidney S. Schupper Interstate Hauling Systems, 72 F. Supp. 663 (D.C. Md. 1947); Willis v. Dennis, *supra* note 4; Fed. Deposit Ins. Corp. v. George-Howard, 55 F. Supp. 921 (W.D. Mo. 1944); McGarry v. City of Bethlehem, 45 F. Supp. 385 (E.D. Pa. 1942).

[11]Art. III, § 2 provides, *inter alia*: "The judicial power shall extend to all cases . . . between citizens of different States. . . ."

I, Section 8, Clause 17 of the Constitution gives Congress power to legislate in regard to District judicial matters in addition to the powers contained in the judiciary article. In view of the fact that the District of Columbia is not given representation in Congress and its citizens are denied the right to vote, it cannot be seriously contended to be a state.[12] One also meets insurmountable difficulties in attempting to construe the clause pertaining to the District of Columbia in such a manner as to give Congress additional powers relating to the *judiciary*. That clause pertains solely to *executive* functions in governing the District and does not give the citizens thereof any additional right in use of the federal courts. It would seem that, if the framers of the Constitution had intended to grant such right to District citizens, provision would have been made in the judiciary article. Likewise, it has been said that *all* of the judicial power of the Federal Government is found in Article III, Section 2.[13]

For the foregoing reasons it is submitted that the court was correct in holding the amendment unconstitutional. *Dale McKibben*

MINES AND MINERALS—RULE OF CAPTURE IN OIL AND GAS LAW

D drilling company while engaged in drilling an offset well negligently permitted the well to blowout, crater, ignite and burn for several years. Large quantities of gas were drained from under *P's* adjoining land resulting from *D's* negligent act. *P* sued for damages. HELD: *D* liable in damages since *D* did not acquire title to gas under "rule of capture" although the gas migrated to *D's* well before it was lost. Thus a reasonable appropriation is required before the rule of capture is applied. *Elliff et al. v. Texon Drilling Company et al.* 210 S.W.2d 558 (Texas 1948).

The "rule of capture" simply stated is as follows: The owner of a tract of land acquires title to the oil or gas which he produces from wells drilled thereon, though it may be proved that part of such oil or gas migrated from adjoining lands.[1] This doctrine had its genesis in the early prevailing, though erroneous, opinion that oil and gas in their natural state possessed the quality of free migration and the admitted inability to determine the source of production from any well. This belief and inability resulted in analogies to various common law rules of a somewhat similar nature such as animals *ferae naturae*,[2] percolating waters,[3] solid minerals[4] and others.[5]

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[12]Hepburn v. Dundas and Ellzey, *supra* note 2.

[13]Freely v. Sidney S. Schupper Interstate Hauling Systems, *supra* note 10; Willis v. Dennis, *supra* note 4.

[1]United Carbon Co. v. Cambellsville Gas Co., 230 Ky. 275, 18 S.E.2d 1110 (1929); Hunt v. State, 48 S.W.2d 466 (Tex. Civ. App. 1932); Kelley v. Ohio Oil Co., 57 Ohio St. 317, 49 N.E. 389, 39 L.R.A. 765 (1897); Barnard v. Monongahela Gas Co., 216 Penn. 362, 65 A. 801 (1907); Westmoreland Nat. Gas. Co. v. DeWitt, 130 Penn. 235, 18 A. 724, 5 L.R.A. 731 (1889); Hardwicke, *The Rule of Capture and Its Implications as Applied to Oil and Gas*, 13 TEX. L. REV. 391 (1935).

[2]Westmoreland Nat. Gas Co. v. DeWitt, *supra* note 1; Hague v. Wheeler, 157 Penn. 324, 27 A. 714, 22 L.R.A. 141 (1893).

[3]Peoples Gas Co. v. Tyner, 131 Ind. 277, 31 N.E. 59 (1891); Higgins Oil Co. v. Guaranty Oil Co., 145 La. 233, 246, 82 So. 206, 211 (1919).

[4]Hail v. Reed, 15 B. Mon. 479 (Ky. 1854); Hughes v. United Pipe Lines, 119 N.Y. 423, 23 N.E. 1042 (1890); Northwestern Ohio Gas Co. v. Ullery, 68 Ohio St. 259, 67 N.E. 494 (1903); Stoughton's Appeal, 88 Penn. 198 (1897); Funk v. Haldeman, 53 Penn. 229 (1867); Murray v. Allard, 100 Tenn. 100, 43 S.W. 355, 39 L.R.A. 249 (1897).

[5]Analogy of gas to air has been frequently made. In Peterson v. Grayce Oil Co., 37 S.W.2d 367 (Tex. Civ. App. 1931), it was suggested that an analogy to the law of

The courts in employing these analogies in early cases expressed the view that an owner of a well had the privilege of using or wasting the product as he saw fit regardless of injury to his neighbor or of depletion of a valuable natural resource.[6] The unfortunate neighbor could not have the drainage across property lines enjoined[7] nor could he recover damages therefor.[8] The United States Supreme Court in the leading case of *Ohio Oil Company v. State of Indiana*[9] recognized the inadequacy of these earlier analogies and pointed out that oil and gas are so different in their nature that separate rules should govern.[10] However, the rule of capture has been persistently followed and is followed today by all oil and gas producing states, and, interestingly enough, this is true regardless of whether the state follows the qualified or absolute ownership theory of oil and gas.

As scientific and geological knowledge have advanced, the courts in more recent decisions have limited rather than extended the application of the rule of capture. Expressions of these limitations have varied to some degree. It has been held that the only restriction upon production is that one must abstain from doing anything that may cause a loss;[11] there can not be a deliberate waste to the injury of the neighbor but a reasonable use must be made of minerals produced,[12] nor may an owner do any act injurious to the common reservoir or calculated to destroy it, and should such act be threatened an injunction may be granted.[13] In the case under discussion the limitation is that there must be a reasonable appropriation before the rule of capture applies.[14]

In addition to these court-made limitations statutory enactments have also been effective limitations on the rule of capture. In the earlier statutes the entire emphasis was placed upon the exercise of the police power to prevent waste in the protection of the public interest by conserving these natural resources. Due regard for the proper protection of private correlative rights appears to have been neglected. It is observed, however, that when waste occurs which decreases the ultimate recovery from a pool the landowners and operators are damaged thereby and to this extent private rights were protected. More recent statutes have been designed to protect these private correlative rights which have not been predicated on conservation primarily but have been justified under the right to protect property. The United States Supreme Court early upheld a statute prohibiting the escape of gas on the theory of protecting the private correlative rights of owners of the surface over the reservoir.[15] Later the Court upheld the protection of private rights even though the prevention of waste was

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accretion could be made, but this point was not considered by the Texas Supreme Court on appeal.

[6]Hague v. Wheeler, *supra* note 2. *Cf.* People v. New York Carbonic Acid Co., 196 N.Y. 421, 90 N.E. 441 (1909).

[7]Kelley v. Ohio Oil Co., *supra* note 1; Hague v. Wheeler, *supra* note 2; Peoples Gas Co. v. Tyner, *supra* note 3.

[8]Cain v. South Penn. Oil Co., 76 W. Va. 769, 86 S.E. 883 (1915); Kelley v. Ohio Oil Co., *supra* note 1.

[9]177 U.S. 190 (1900).

[10]These views have been adopted by many states since this decision.

[11]Higgins Oil & Fuel Co. v. Guaranty Oil Co., *supra* note 3.

[12]Louisville Gas Co. v. Kentucky Heating Co., 117 Ky. 71, 77 S.W. 368 (1903).

[13]Manufacturer's Gas & Oil Co. v. Indiana Gas & Oil Co., 155 Ind. 461, 57 N.E. 912 (1900).

[14]Until recently the limitation has been on the manner of taking rather than on the amount taken.

[15]Ohio Oil Co. v. State of Indiana, *supra* note 9.

not involved.[16] It is to be noted that in the recent Mississippi Oil and Gas Act of 1948[17] it is expressly stated therein that one of its purposes is the safe-guarding, protecting and enforcing the co-equal and correlative rights of surface owners over a common reservoir.

The Texas Supreme Court in the instant case logically concluded that the negligent waste and destruction of an adjoining landowner's gas was not a legitimate drainage nor a reasonable appropriation thereof, and consequently *P* did not lose his right under the rule of capture. This decision reflects the court's concern over the protection of private correlative rights by recognizing that at the time of removal the oil and gas belonged to *P* and the wrongful dissipation deprived him of his right of production.

There have been no decisions in Mississippi involving the rule of capture. The Mississippi Supreme Court, however, has indicated that it will be applied should the question arise. The dissenting opinion of Justice McGowan in *Gulf Refining Company of Louisiana v. Terry*[18] contains this obiter dictum: "This court is further committed to the doctrine that oil and gas in place in the soil are minerals forming a part of the soil and belonging to the owner thereof . . . and this is true although the adjoining landowner may . . . withdraw the oil or gas because of its fugacious nature." The *Terry* case has been overruled by *Pace et al. v. State ex rel. Rice*[19] in which the rule of capture is expressly recognized but the court's statement was not necessary to the decision. Since the court has stated that the rule of capture is recognized, the question is presented as to what extent it will be applied when a case arises involving drainage. In such a situation the court could follow the prevailing view existing in other states and hold that there is no liability for drainage from under adjoining lands so long as the drainage is for a reasonable appropriation. This would be in accord with the case under discussion.

Alternatively, the court could hold that as between adjacent land-owners each has the right to produce an ascertained amount from the pool, and if one owner is producing more than his fair share the correlative right of the other should be compensated by damages though the producer is validly utilizing all oil and gas produced. This conclusion can be supported by the court's recognizing that science has advanced to the extent that competent evidence can be obtained as to drainage.[20] The courts inferentially recognize this each time damages are awarded to a lessor whose lessee has failed to drill offset wells and allowed gas or oil to escape into wells on adjoining land.[21] This latter conclusion appears the more logical and is further substantiated by

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[16]Thompson v. Consolidated Gas Utilities Corp., 300 U.S. 55 (1937).

[17]Advance Sheet 7, General Acts of Miss. 1948, House Bill No. 80, § 1.

[18]163 Miss. 869, 895, 142 So. 457, 462 (1932).

[19]191 Miss. 780, 4 So.2d. 270 (1941).

[20]In Murphy Oil Co. v. Burnett, 287 U.S. 289 (1932), involving income tax, the United States Supreme Court upheld a finding of the Commissioner of Internal Revenue ascertaining the amount of oil in place under particular tracts of land.

[21]All jurisdictions hold that a lessee is expected properly to protect property lines against drainage by drilling offset wells even though the lease contains no express clause to this effect. Walker, *The Nature of the Property Interests Created by an Oil and Gas Lease in Texas*, 11 TEX. L. REV. 431, *et seq.*, SUMMERS, OIL AND GAS (1927) 416-419 § 130; MERRILL, COVENANTS IMPLIED IN OIL AND GAS LEASES, (1926), 164-182, § 57-71; Brewster v. Lanyon Zinc Co., 140 F. 801 (1905); Humphreys Oil Co. v. Tatum, 26 F.2d 882 (C.C.A. 5th 1928) cert. den. 278 U.S. 633 (1928); Beatty-Nickel Oil Co. v. Smethers, 49 Ind. 602, 96 N.E. 19 (1911); Culbertson v. Iola Port-

the Mississippi Oil and Gas Act previously referred to,[22] which makes waste of oil and gas unlawful as defined therein. Waste in this act contemplates both surface and sub-surface waste and includes a prohibition against the abuse of the correlative rights of each owner of oil or gas in a pool producing more than his just share of the production from such pool. The act also creates a State Oil and Gas Board which is given the power, *inter alia,* to prevent, so far as is practicable, reasonably avoidable drainage from each developed unit which is not equalized by counter-drainage and to safe-guard, protect and enforce the correlative rights of the owners.

Should the second alternative conclusion be adopted by the court it is submitted that in this manner the correlative rights of the respective landowners over a pool of oil and gas will be protected in a real and true sense. This conclusion would not conflict with or change any existing property rights, but on the contrary, would recognize and enforce them.

W. O. Luckett

Negligence—Mississippi's Comparative Negligence Statute—Wisconsin Statute Compared

Plaintiff's hand was mangled as he attempted to load a bull from defendant's stockyard onto a truck. Plaintiff's suit for damages was dismissed by the trial court on a jury finding that the plaintiff and an agent of the defendant were each guilty of 50 per cent of the casual negligence. Held: Judgment affirmed. *Nelson v. Chicago, M. St. P. Ry.,* 32 N.W. 2d 340 (Wis. 1948).

At common law contributory negligence operates as a complete bar to the recovery of the injured plaintiff.[1] The harshness of this doctrine and the hardship resulting from its application has provoked various attempts to avoid it. For a time a few courts, particularly the Supreme Court of Illionis,[2] made an effort to modify the rigid contributory negligence rule by classifying negligence into degrees and ruling that a plaintiff might recover if his negligence was ordinary, while that of the defendant was gross.[3] The jurisdictions which followed this common-law doctrine have long since repudiated it,[4] and it is doubtful that any jurisdiction in the absence of statute follows it at the present time.[5]

A number of jurisdictions in the United States have enacted statutes providing for apportionment of damages according to fault,[6] but few of these so-called comparative negligence statutes are so general in application as the Acts of Mississippi and Wisconsin.[7] Indeed, it may be said that the statutes of these two states are alone

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land Cem. Co., 87 Kan. 529, 125 P. 81 (1912); Hughes v. Busseyville Oil and Gas Co., 180 Ky. 545, 203 S.W. 515 (1918); Lawrence Oil Corp. v. Metcalfe, 241 Ky. 353, 43 S.W.2d 986 (1931); Eastern Oil Co. v. Beatty, 71 Okla. 275, 177 P. 104 (1918).

[22]Advance Sheet 7, General Acts of Miss. 1948, House Bill 80, p. 15.

[1]Restatement Torts § 463 (1934); Prosser, Torts 393 (1941).

[2]Prosser, Torts 404 (1941); 38 Am. Jur. 916; *See* note, 114 A.L.R. 831, 834.

[3]Rockford, R.I. & St. L. R. v. Delaney, 82 Ill. 198, 25 Am. Rep. 308 (1876); Peoria Bridge Asso. v. Loomis, 20 Ill. 235, 71 Am. Dec. 263 (1858); *Accord:* Union Pac. Ry. v. Rollins, 5 Kan. 167 (1869).

[4]City of Lanark v. Dougherty, 153 Ill. 163, 38 N.E. 892 (1894); Atchinson, T. & S. F. Ry. v. Morgan, 31 Kan. 71, 1 P. 298 (1883).

[5]38 Am. Jur. 916.

[6]Prosser, Torts § 406 (1941); *See* note, 114 A.L.R. 837.

[7]Miss. Code Ann. § 1454 (1942); Wis. Stat. § 331.045 (1939).

generally applicable to all negligence actions.[8] Most of the other jurisdictions have statutes which are applicable only in special types of cases, such as those involving employer's liability, workmen's compensation and carrier's liability.[9]

The decision in the subject case brings Wisconsin's statute into play, and clearly illustrates the chief distinction between the comparative negligence statute of that state and Mississippi's statute.[10] This distinction is occasioned by a peculiar feature in the Wisconsin Act which affects to a large degree the chances of an injured plaintiff to recover in a case wherein he is found to be contributorily negligent. The unusual feature is a provision that a negligent plaintiff shall recover only when his negligence is less than that of the defendant.[11] Thus in the subject case, recovery by the plaintiff is barred because his negligence was found to be equal to that of the defendant's agent. It is readily apparent that such a provision could lead to the curious and ridiculous situation wherein a plaintiff might recover 51 per cent of his damages if he were found to be 49 per cent negligent, but be completely barred, as in the subject case. if found to be contributorily negligent in the additional amount of one per cent.[12] Such a possibility is avoided by the provisions of the Mississippi statute which allow a plaintiff to recover regardless of the amount of his negligence.[13] Under the Mississippi statute the plaintiff in the subject case would have been entitled to recover 50 per cent of his damages.

In Wisconsin it is the rule that a denial of negligence by the defendant raises the issue of contributory negligence,[14] while in Mississippi a defense of contributory negligence must be specially pleaded.[15] This difference in rules of pleading could conceivably effect a difference in the number of cases in which the comparative negligence statutes of the respective states are brought into operation, but in practice, while the Mississippi Supreme Court has held that a party desiring that the jury be instructed as to the effect of contributory negligence must ask for such an instruction,[16] it has also ruled that although contributory negligence was not pleaded and although no instruction thereon was given, the jury may diminish the damages of the plaintiff

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[8]PROSSER, TORTS § 406 (1941).

[9]38 AM. JUR. 916; ANNO: 114 A.L.R. 837.

[10]"Contributory negligence shall not bar a recovery in an action by any person or by his legal representative to recover damages for negligence resulting in death or injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished by the jury in the proportion to the amount of negligence attributable to the person recovering." WIS. STAT. § 331.045 (1939), "In all actions hereafter brought for personal injuries, or where such injuries have resulted in death, or for injury to property, the fact the person injured, or the owner of the property, or person having control over the property may have been guilty of contributory negligence shall not bar a recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured, or the owner of the property, or the person having control over the property." MISS. CODE ANN. § 1454 (1942).

[11]*Ibid.*

[12]PROSSER, TORTS 406 (1941), note 91; Campbell, *Wisconsin's Comparative Negligence Law,* 7 WIS. L. REV. 222 (1931-32); Whelan, *Comparative Negligence,* 1938 WIS. L. REV. 465.

[13]*See* note 12 *supra.*

[14]Cunningham v. Lyness, 22 Wis. 245 (1867); Harper v. Holcomb, 146 Wis. 183, 130 N.W. 1128 (1911).

[15]Yazoo & M. V. R. v. Lucken, 137 Miss. 572, 102 So. 393 (1924).

[16]Lindsay Wagon Co. v. Nis, 108 Miss. 814, 67 So. 459 (1914); Alabama & V. R. v. McGee, 117 Miss. 340, 78 So. 296 (1918).

in proportion to the contributory negligence chargeable to him.[17] It has also been held in Mississippi that when the jury has failed to diminish damages in proportion to the negligence chargeable to the plaintiff the verdict will not be permitted to stand.[18] Therefore, it is apparent that the difference in the rules of pleading does not offset the liberality of application which distinguishes the Mississippi statute from the Wisconsin Act.

Opposition to both the common law conception of apportionment of damages according to fault and statutes such as those here considered has generally found expression in arguments concerning the practicability of the administration of the doctrine. Many authorities contend that it is impossible to ascertain proportions of negligence, because there is no yard stick to measure the relative fault of the parties, and further that the administrative difficulties under our jury system would outweigh the substantive advantages of the rule.[19]

It is submitted that such objections should be held of little consequence, particularly under Mississippi's statute, which makes no attempt to classify negligence according to degrees.[20] It seems that it should be recognized that our juries are just as capable of making the comparison required by the statute as they are of determining the causation issue, or even the negligence issue itself. The rule is admittedly good in theory and experiences under the Mississippi and Wisconsin statutes should prove the feasibility of comparative negligence statutes.

Paul N. Nunnery

Real Property—Constitutional Law—Judicial Enforcement of Restrictive Covenants Based on Race or Color Invalid

Defendant, a negro, purchased land subject to a covenant restricting use and occupancy to members of the Caucasian race. In a suit by owners of other property subject to the covenant to restrain defendant from taking possession, defendant contended that judicial enforcement of the restrictive agreement violated rights guaranteed to him by the Fourteenth Amendment. Held: The Equal Protection Clause inhibits judicial enforcement by state courts of restrictive covenants based on race or color. *Shelley v. Kraemer,* 68 S. Ct. 836 (1948).

Provisions against alienation to members of a certain race, or prohibiting use or occupancy by such members have appeared as conditions in deeds,[1] in contracts for the sale of real property,[2] and in agreements between property owners.[3] In some jurisdictions the validity and enforceability of these restrictions has turned upon

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[17]Goodman v. Lang, 158 Miss. 204, 130 So. 50, *sugg. of error overruled,* 130 So. 311 (1930).

[18]Tendall v. Davis, 129 Miss. 30, 91 So. 701 (1922).

[19]Prosser, Torts 406 (1941); Herrell v. St. Louis S.F.R., 324 Mo. 38, 23 S.W.2d 102 (1929); Menger v. Laur, 55 N.J. Law 205, 26 A. 180 (1893); Wittstruck v. Lee, 62 S.D. 290, 252 N.W. 874 (1934).

[20]Yazoo & M. V. R. v. Carroll, 103 Miss. 830, 60 So. 1013 (1913); Yazoo & M. V. R. v. Williams, 114 Miss. 236, 74 So. 835 (1917); Gulf, M. & N. R. v. Arrington, 107 So. 328 (Miss. 1926).

[1]Parmalee v. Morris, 218 Mich. 625, 188 N.W. 330 (1922); Koehler v. Rowland, 275 Mo. 573, 205 S.W. 217 (1918).

[2]Janss Investment Co. v. Walden, 196 Cal. 753, 239 P. 34 (1925).

[3]Corrigan v. Buckley, 299 F. 899, (App. D.C. 1924); Mays v. Burgess, 147 F.2d 869 (App. D.C. 1945).

whether they were against conveyance to such persons or merely against use and occupancy by them.[4] Generally, racial restrictions merely upon use and occupancy of the land do not contravene the rule against restraint upon alienation.[5] But restrictions upon conveyance to members of an excluded race have been held to violate the rule.[6]

Ambiguities in the agreements, a changed character of the community in which the property is located, laches and waiver in enforcement, technical deficiencies in signatures, failure of the subdivider to sufficiently follow a general plan or scheme of restriction on the subdivision, and lack of notice have furnished the grounds on which the courts have refused enforcement of restrictive covenants.[7]

The first case on record dealing with a restrictive agreement based on race was a decision by a United States Circuit Court in which it was held that enforcement of the agreement by the state courts of California would be state denial of equal protection of the laws.[8] However, since then a long line of state precedents have held that such agreements were not prohibited by the Fourteenth Amendment,[9] were not against public policy,[10] and when made a condition in a deed, were not repugnant to the fee.[11] All the state courts that have considered the constitutional issue involved have held that the agreements were not prohibited by the Fourteenth Amendment. The ground usually relied upon for this holding has been that the discrimination resulted from a private agreement and not from state action.[12] This position was later thought to have been substantiated by the refusal of the United States Supreme Court to entertain jurisdiction in a case involving a restrictive covenant against conveyance of land to Negroes in the District of Columbia.[13] But since the Equal Protection Clause is not applicable there, no question under it could have been decided. Further, the court expressly declared that it did not decide whether judicial enforcement of the agreement was prohibited by the Fifth and Fourteenth Amendments, though by way of dictum it declared that such contention was lacking in substance.[14]

The constitutional issue turns upon two propositions. First, it is settled that the action of the state to which the Fourteenth Amendment has reference includes the ac-

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[4]Los Angeles Investment Co. v. Gary, 181 Cal. 680, 186 P. 596 (1919); Littlejohns v. Henderson, 111 Cal. App. 115, 295 P. 95 (1931); Parmalee v. Morris, *supra* note 1; Burkhardt v. Lofton, 63 Cal. App.2d 230, 146 P.2d 720 (1944).

[5]Meade v. Denniston, 173 Md. 295, 196 A. 330 (1938); Edwards v. West Woodridge Theatre Co., 55 F.2d 524, (App. D.C. 1931).

[6]Porter v. Barrett, 233 Mich. 373, 206 N.W. 532 (1925); Schulte v. Starks, 231 Mich. 102, 213 N.W. 102 (1927); White v. White, 108 W. Va. 128, 150 S.E. 531 (1929); Title Guarantee & Trust Co. v. Garrott, 42 Cal. App. 152, 183 P. 470 (1919).

[7]Miller, *Race Restrictions on the Use and Sale of Real Property*, 2 NAT'L B.J. 24 (1944).

[8]Gandolfo v. Hartman, 49 F. 181 (1892).

[9]Meade v. Dennistone, *supra* note 5; Chandler v. Ziegler, 88 Colo. 1, 291 P. 822 (1930); Edwards v. West Woodridge Theatre Co., *supra* note 5; Mays v. Burgess, *supra* note 3; Hurd v. Hodge, 162 F.2d 233 (1947).

[10]Steward v. Cronan, 105 Colo. 393, 98 P.2d 999 (1940); Mays v. Burgess, *supra* note 3; Lion's Head Lake v. Brzezinski, 23 N.J. Mis.R. 290, 43 A.2d 729 (1945).

[11]Chandler v. Ziegler, *supra* note 9; Steward v. Cronan, *supra* note 10; See note, 9 A.L.R. 120 (1919); 66 A.L.R. 531 (1929); 114 A.L.R. 1237 (1938); 162 A.L.R. 180 (1945).

[12]Chandler v. Ziegler, *supra* note 9; Burkhardt v. Lofton, *supra* note 4.

[13]Corrigan v. Buckley, 271 U.S. 323 (1926).

[14]*Ibid.* page 330-331.

tion of state courts and its judicial officials.[15] But the second proposition, that enforcement by a state court of a private agreement resulting in a forbidden discrimination was state action inhibited by the Fourteenth Amendment had never before been decided.[16] The Courts reasoning was that since an exclusion of members of a particular race from use and occupancy of land effected by state legislation was a forbidden discrimination, it was therefore a forbidden discrimination for a state court to enforce a private agreement and thereby accomplish the same result.[17] Thus what the legislature could not do the judiciary could not do.

The instant case, when considered in the light of *Smith v. Allwright*[18] and *Elmore v. Rice*[19] represents a broadened conception of the question of what constitutes state action within the meaning of the Fourteenth Amendment.

Ernest M. Jones

Wills—Contingent Devise to Children Not Including Adopted Children—Testator Encouraged Adoption

In 1921 testator wrote his will and devised a life estate[1] to his son and daughter, who were then unmarried, with remainder over of each child's estate to their children. The will provided that "should either child die without issue, the surviving child or child's children shall inherit the property of the other." In 1935, about fifteen months before the death of testator, his daughter was obliged to undergo a surgical operation which left her unable to have a child of her own. No child had been born to her. When testator was advised by his daughter that she intended to adopt a child or children, the testator "encouraged her to do so and stated that to him her adopted child or children would be the same as if her own by birth." After the testator's death the daughter adopted three children, " . . . the decree of adoption being such as to confer upon them all the rights of inheritance which belong to children born of her body." Held: The daughter's adopted children were not within the term "issue" and were therefore not entitled to take as devisees. *Everett v. Dockery,* 33 So. 2d 313 (Miss., 1948), *suggestion of error sustained in part in* 33 So. 2d 832 (Miss. 1948).

The points of law here involved seem to be of first impression in Mississippi. The court, in deciding that the adopted children would not take, cited only two cases to support its decision.[2] Neither dealt with the problem of adoption, but rather with whether the word "issue" included only the immediate child or the immediate child and the grandchild.

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[15] *Ex parte* Virginia, 100 U.S. 339 (1880); Brinkeroff-Trust Co. v. Hill, 281 U.S. 673 (1930); Twining v. New Jersey, 211 U.S. 78 (1908); Powell v. Alabama, 287 U.S. 45 (1932); Cantwell v. Connecticut, 310 U.S. 296 (1940); A. F. of L. v. Swing, 312 U.S. 321 (1941); Bridges v. California, 314 U.S. 252 (1941).

[16] Shelley v. Kraemer, 68 S.Ct. 836 (1948).

[17] Richmond v. Deans, 281 U.S. 704 (1930); Harmon v. Tyler 273 U.S. 668 (1927); Buchanan v. Warley, 245 U.S. 60 (1917).

[18] 321 U. S. 649 (1944).

[19] 72 F. Supp. 516 (E.D.S.C. 1947).

[1] Court held devise by testator to daughter "for her and her children" and devise of other land to son "on same terms" and "to him and at his death to his children" with further provision that should either child die without issue the surviving child or child's children should inherit created merely life estate in son and daughter.

[2] Jordan v. Roach, 32 Miss. 481 (1865), and Newcomb v. Newcomb, 197 Ky. 801, 248 S.W. 198 (1923).

Generally the terms "issue" and "children" in a will refer to natural or blood relationships and do not extend to adopted children, in the absence of a clear showing of a contrary intention.[3] Hence it is not a question of the right of an adopted child to inherit, but simply one of the testator's intention with respect to those who are to share in his estate.[4] That is determined from the provisions of the particular will and the extraneous circumstances.[5]

Where the testator provides for his own children in his will, he is generally deemed, in the absence of an express provision concerning them, to have intended to include adopted children, but the contrary is true when he provides for the children of another.[6] However, the courts tend to exclude from the term "issue" children adopted after the testator's death and to include those who were adopted to the knowledge of the testator.[7]

Thus, since the children were not those of the testator, and since they were not adopted by his daughter until after his death, the presumption would be that they were not included within the terms of the will. However, there are strong reasons for believing that the testator intended the adopted children to be devisees. Since a will is subject to revocation at any time, it may be read in the light of circumstances as they existed immediately before the death of the testator.[8] When one considers that the testator knew of the inability of his daughter to have a child of her own, that he knew that she intended to adopt a child or children, and that he then "encouraged her to do so and stated that to him her adopted child or children would be the same as if her own by birth," it would appear that this evidence would overcome the presumption that the testator did not intend for adopted children to be included as devisees.

Overton A. Currie

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[3]Comer v. Comer, 195 Ga. 79, 23 S.E.2d 420, 144 A.L.R. 664 (1942); 57 AM. JUR. 768.

[4]Puterbaugh's Estate, 261 Pa. 235, 104 A. 601, 5 A.L.R. 1277 (1918); 1 AM. JUR. 664.

[5]Brock v. Dorman, 339 Mo. 611, 98 S.W.2d 672 (1936); PAGE, WILLS 903 (2d ed. 1928), states: "The context, the entire will, or the surrounding circumstances may modify . . . [the] primary meaning" [of issue]. 57 AM. JUR. 921, states, "The question whether an adopted child is to be considered as coming within the purview of word 'issue' as used in a will depends ultimately upon the intention of the testator, the conclusion that, under the provisions of the particular will involved and the extraneous circumstances shown, the word should be construed to include or to exclude adopted children having been in various instances."

[6]Beck v. Dickinson, 99 Ind. App. 463, 192 N.E. 899 (1934); *See* Note, 144 A.L.R. (1934).

[7]Smith v. Thomas, 317 Ill. 158, 147 N.E. 788 (1925); *See* Note, 70 A.L.R. 621; 144 A.L.R. 672; 57 AM. JUR. 768; 57 AM. JUR. 921.

[8]Downing v. Gringsby, 251 Ill. 568, 96 N.E. 513 (1911); Harris v. Harris, 97 N.J. Eq. 190, 127 A. 108 (1925); ATKINSON, HANDBOOK OF THE LAW OF WILLS 760 (1938), § 266, states: "A will is generally presumed to speak from the time of the testator's death for that is the time that the will becomes effective and it is assumed that the testator realized this fact."

RECENT BOOKS

This department undertakes to note or review briefly current books on law and matters closely related thereto. Periodicals, court reports, and other publications that appear at frequent intervals are not included. The information given in the notes is derived from inspection of the books, publisher's literature, and the ordinary library sources. The information given in the reviews is derived from a personal reading of the book by the individual whose name appears at the bottom of the review.

BRIEF REVIEWS

THE CONFLICT OF LAWS: A Comparative Study. By Ernst Rabel. Vol. I: Introduction: Family Law. Ann Arbor, University of Michigan Press; Chicago, Callaghan and Company, 1945, pp. 745. $8.00.

THE CONFLICT OF LAWS: A Comparative Study. By Ernst Rabel. Vol. II: Foreign Corporations: Torts: Contracts in General. Ann Arbor, University of Michigan Press; Chicago, Callaghan and Company, 1947. pp. 705. $8.00.

In no field of law has there been as much disagreement, illogic, and confusion among legal systems as in conflict of laws, or private international law. This perhaps is attributable as much to a pervasive nationalism and provincialism as to the formulation of illogical principles hostile to a desirable international uniformity. Both of these volumes are the beginning of a comprehensive although not exhaustive treatment of comparative conflict of laws. Although these books are not for the neophyte, they should be of great value to courts and lawyers who are desirous of learning comparative legal doctrines and the basis of conflicts problems. They are a product of scholarly work and analysis.

The author is well qualified to undertake this task. Prior to World War II Ernst Rabel was considered one of the chief legal personalities of Europe. Born in Austria in 1874, he studied law in his own country, in Germany, and in France, and taught Roman and modern civil law in Switzerland and Germany. He has practiced law in Vienna and served as a judge in the appellate courts of Basle and Munich. He has also served as a judge of The Court of International Justice at the Hague. In 1926 he was appointed director of the Kaiser Wilhelm Institute of Foreign and International Private Law in Berlin. This Institute was devoted to research as well as to the giving of practical information and advice to the German Foreign Office, and to legislative authorities, courts, lawyers, and business firms. The Institute exercised a profound influence in legal thought and methods not only in Germany but all over the continent. The Nazi regime resulted in Dr. Rabel coming to this country in 1939, under the auspices of the American Law Institute. The original plan was for him to prepare a comparative restatement of conflicts of law, as a parallel to the A. L. I.'s *Restatement*. However, the differences between European and American jurisprudence did not permit this type of treatment. In 1942 Dr. Rabel went to the University of Michigan Law School, under whose auspices he has completed these two volumes.

Their primary purpose is to make a comparison of the significant legal systems of conflict of laws with reference to the specific problems arising in each topic. Volume One begins with a splendid chapter on "Literature and Sources of Conflicts Law". Dr. Rabel points out that there are only three comprehensive codifications of conflicts rules, they being the two Latin-American multi-partite treaties and the

American Law Institute's *Restatement of Conflicts of Law.* The Latin-American codes rest largely on a selection among literary opinions of French writers, and are little used in litigation. The American *Restatement* has been accepted in the courts to the extent that it reflects the actual cases, but he rightly observes that its doctrinal basis, essentially advocating the theory of territorialism, which predicates exclusive control by domestic law in each jurisdiction, has been rejected by most contemporary authorities.

Every conflicts rule contains two parts, the first of which defines its object, that is, certain operative facts, the legal consequences of which are determined in the second part. An essential element of the second factor is the indication of a point of contact or connecting factor, the decision of which state shall give the solution. Dr. Rabel believes that "conflict rules must operate as do all other rules directly on the facts of life, not on a legally predicated, abstract subject matter. They refer to merely factual events, such as the marriage ceremony before the Greek priest. . ." etc. With this premise, all speculation is ended "about the necessary dependence of conflicts rules on some legal system. . ." His comparative method is outlined on pages 49-50 as follows:

> In this view, the factual situation, which is the true premise of any conflicts rule, must be referable indifferently to foreign as well as to domestic substantive law. Hence, if legal terms are used to describe this factual situation, they must be susceptible of interpretation with reference to foreign institutions, even those unknown to *lex fori.* This operation includes comparative research. Thoughtful courts have always employed this method, but systematic efforts are needed gradually to free national conflicts rules from undue dependence on internal conceptions.

He does not consider the situations where domestic law and foreign law differ as to what constitutes a "factual situation". And of course they may further differ as to what constitutes relevant facts. Dr. Rabel pleads for international uniformity based upon a common "factual situation". He contends that "the question is merely that of 'freeing', 'emancipating', these rules from their domestic background." Renvoi, in the remission or reference back sense of the term, may solve the conflict between legal systems advocating on the one hand the law of nationality for personal law, and on the other hand making domicil the test. This may be the *modus vivendi,* although he concedes that "it cannot be applied in the same manner by the two antagonistic groups and at the same time reach conformity." The difference between nationality and domicil as tests of personal law "require different technique in each group of countries." The nationality principle does not mean that a foreign national "is subject necessarily to the substantive law of his country; it means that the state to which the individual *belongs* should determine his personal relations." In other words, "the reasonable construction is that the law of place of domicil determines what law should govern." He therefore believes that the English model "should be extended to other types of cases and to other countries in accordance with the spirit of the principles guiding the forum."

In the determination of domicil progress may be made toward uniformity in its definition, he thinks, if a distinction is made in the concept as a category of status law from other meanings of domicil, and if we also differentiate rules dealing with capacity of contracting and of recognition of foreign judgments, etc., in order "to ascertain what kind of domicil is a desirable connecting factor for each of these separate matters." Yet without the formulation of the generally applied conception of domicil, the application of the suggested concept may result in a multitude of at-

tempted factual codifications, not productive of clarification or of precision in application. Dr. Rabel concludes that both systems of testing personal law, by nationality and domicil, are seriously defective. It is suggested that the European domiciliary test could be improved by requiring that any voluntary change of domicil be reported to a public authority, empowered to investigate, and that more uniformity could be reached in America toward acquisition of domicil by an alternative method, similar to that required by some divorce statutes, requiring the lapse of a certain period during which domicil must have existed. These would obviate at least the "clandestine establishment of a domicil of choice which renders doubtful the determination of so many cases."

The author then proceeds to make a detailed comparative examination of questions of capacity, of marriage, of divorce and annulment, and of parental relations. In the field of divorce, Dr. Rabel recommends the uniform requirement of a minimum residence time and its rigid enforcement. Where the parties are actually domiciled in two different states, the courts should apply the law of the last common domicil. Although he approves of the result in the first *Williams* case, insofar as it enlarges the domain of compulsory recognition by eliminating the defence based on lack of personal jurisdiction over the defendant, he criticizes it because it "discarded so easily" a careful factual analysis of whether one of the spouses had acquired jurisdiction in Nevada. This first volume was published prior to the second *Williams* decision, but no doubt Dr. Rabel would be satisfied with its result. On the other hand, he may deplore the results in the more recent *Estin* case,[1] emphasizing two separate territorial controls and the continuance of the obligation for payment of separate maintenance after a divorce had been obtained in a foreign state with jurisdiction over the plaintiff only.

Volume Two speaks as of December 1945, when the manuscript was completed, but because of a delay in publication the author was able to include various references to later material. It is a comparative study of conflicts principles with reference to foreign corporations, torts, and contracts in general.

In undertaking to localize the personal law of legal persons, the author criticizes the *Restatement of Conflicts* for stating a wholly inadequate conception of a corporation, and for the more serious neglect of non-profit corporations, public corporations, and the innumerable mixed forms of associations that have developed in the part century. He then makes a detailed conceptual classification of legal persons, unincorporated associations, and contracts of joint undertakings, and analyzes the most important types of these business organizations in common use in the various systems of law. Foundations and non-profit associations live under a personal law analogous to that of business corporations. Yet failure to designate the various purposes of the rules regarding foreign corporations has contributed largely to the controversy concerning whether legal persons are able to have a nationality.

Dr. Rabel suggests that such conflicts problems should be solved by calling a corporation foreign when it is considered governed by the law of a foreign state. The important postulate of convenience should be emphasized, he believes. Nationality should be limited to purposes of public law, and not extended to private conflict of laws questions. It should be defined as the connection of a corporation with another country. This would permit a reconciliation of the European doctrine of the central

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[1]Estin v. Estin, 68 S. Ct. 1213 (1948).

office of the corporation and the American doctrine of the place of incorporation. The Latin-American view denying nationality to corporations would appear to be an economically and socially desirable objective under the fatcs existent in those countries, but it is difficult to find any type of uniformity in the application of such tests. Manifestly various courts or countries may disagree as to what is convenience.

In considering the localization of the personal law of legal persons, the two rival systems may be called the incorporation principle, pointing to the law of the state of incorporation, and the central office principle, pointing to the law of the state wherein the central controlling office of the corporation is located. The former is Anglo-American, the latter civil. The author examines in detail the factors to be considered in connection with both of these theories. He points out that "the conceptual difference between the two systems would be somewhat lessoned if the dogma that the domicil is necessarily in the state of incorporation were to be taken seriously in Anglo-American law." Dr. Rabel believes that some realistic uniformity might be obtained by prescribing in the local requirements for incorporation that the central office should be in the state of incorporation. This would leave conflict principals intact and could be followed by those states which have no desire to create corporations for foreign consumption. The continental conflicts principle, he submits, is the realistic equivalent of the common law doctrine with reference to individuals. This domiciliary rule has as much to recommend it for corporations as it has for individuals.

Dr. Rabel documents thoroughly the fact that the courts have developed a method of analyzing the mixed nature of unincorporated business associations, such as partnerships, business trusts, joint stock companies, labor unions and clubs, for purposes of federal revenue, state taxation, licensing statutes, etc. He believes that the same approach is proper for the purpose of ascertaining the applicable law, and that it is logical to assume that all organizations enjoy a personal law at least to the extent that corporate attributes attach to them.

The territorial theory of recognition of foreign corporations permits every state to decide arbitrarily what foreign corporations should have legal personality within its own territory. Yet the international theory of recognition brings corporations into a position analogous to that of individuals. The capacity of a corporation, the authority of its agents and the powers denied to a corporation are primarily determined by its personal law. But a contrast occurs in construing corporate powers. In modern civil law, capacity to have rights and powers pertains to juristic persons in the same full extent as to individuals, but the civil law freezes this full capacity to a formal fixed group of facilities. However, although a juristic person at civil law ought not to do certain transactions, it can do them with legal effect, and hence any transaction with a third person is valid if there is no fraudulent collusion. The situation is, of course, entirely different in Anglo-American law, whose doctrine of special capacities has resulted in a harsh and inflexible application in many cases. The ambiguity is illustrated by Section 166 of the *Restatement,* which provides that "the effect of a rule directed to be done by a foreign corporation is governed by the law of the state where it is done." Under this principle it is almost impossible to draw a line between the compass of the powers of a corporation and the effect of an act beyond such powers. Dr. Rabel believes that the resulting plea of ultra vires ought to be governed by the law that governs the contract.

The concept of "doing business" receives a thorough comparative treatment. It exists for three distinct purposes: Qualifying for licenses, jurisdiction, and taxation.

The extreme flexibility of the American doctrine is somewhat modified in Great Britain, where registration is obligatory for foreign corporations having "established a place of business" in the kingdom. This appears to require some "local habitation of its own". Hence the curious doctrine of branch offices. But in so far as the establishment forms an organic part of the entire enterprise and participates therein, it participates in the personal law of the main organization. Yet the authority of its agents, personal liability of the branch office to third persons, and the responsibility to local administrative provisions are determined by the territorial law.

The old theory that a state may exclude corporations created in other states from doing business in the forum has given place to that of freely admitting foreign juristic persons. If a state has no reason for intensified control, such as over public utilities, finance and insurance, Dr. Rabel believes that "it should cooperate with the world and limit its supervision to the really necessary measures."

The four chapters of comparative analysis of conflicts in tort laws is necessarily somewhat general. The basic principle of the law of the place where the tort occurs is modified by all legal systems in numerous situations, and the author outlines examples of this. Dr. Rabel believes that the number of jurisdictions with which the facts of a tort may be locally connected is considerably reduced if we eliminate on one hand all preparatory acts, and on the other hand the effect of a completed injury, such as in the case of personal harm, death and pecuniary losses. Choice of law would then be limited to the completion of tortious acts or injury, that is, the invasion of the interest. In this respect, he thinks that the traditional American rule is essentially nearer to this view than any other present conflicts law. "It would seem desirable to stress one or the other local connection according to the various characteristics of the various liabilities."

Conflicts problems with reference to contracts is a source of inumerable difficulties. The courts often times choose, without any coordination, between at least four approaches, namely, the law of the place where the contract is made, of the place where the contract is to be performed, the law intended by the parties to be applied, and the law which upholds the validity of the contract. Civil law countries vary, in denying choice of law by the parties, in construing from the entire factual situation the proper law to be applied, in the light of the parties' presumed intention, and in permitting agreement of the parties on the applicable law. Choice of law by the parties, called the "party autonomy" doctrine, is denied of course by Beale and by the silence of the *Restatement* on everything connected with it, but Dr. Rabel believes that the intention doctrine would be conducive toward a reasonable and fair uniformity. He attacks the various theories restricting party autonomy, including that which requires that a choice of contract law by the parties must have a substantial connection with one of the jurisdictions selected. "This establishes a broad theory against evasion which nevertheless does not prevent the parties from choosing a foreign law having some substantial connection with the contract but rejects claims of the forum grounded on a much closer connection." Although the distinction does not seem to be adequate, Mississippi lawyers will be interested in his comments on the Mississippi cases applying the intention and substantial connection rules. The author documents his opinion by analyzing some of the Mississippi usury cases, wherein the courts examine the facts in order to see whether there are enough elements to support the stipulated localization. He properly observes that this method "demonstrates the usefulness of an elaborate approach to individual problems."

These volumes represent the full application of comparative methods to conflicts rules. The need for a comprehensive survey has been urgent, and these two volumes are excellent steps in meeting it. Perhaps the remedy for provincialism in conflicts is in the creation of a wider outlook than exists at the present time. The author states his main purpose as follows: "What this book is intended to suggest is a patient and concerted world wide discussion" which will lead to "reconstruction of the international purpose and the undeveloped resources of this branch of the law."

The above discussion of a few points in these two volumes indicate, sufficiently for the purpose of this review, the author's exhaustive and interesting analysis of the various conflicts problems in the stated fields. It is a thorough work of research, but, because of the vast field covered by it, the reader must necessarily keep in mind its limitations. However, it is an excellent synoptical treatment of comparative conflict of laws. Both volumes are well printed and contain a bibliography, a table of statutes, and a table of Anglo-American cases.

*William N. Ethridge, Jr.**

AVIATION ACCIDENT LAW. By Charles S. Rhyne; (1947); The Columbia Law Book Company, Washington 6, D. C.; pp. 315; $7.50.

Since W. Jefferson Davis wrote his pioneer work, *Law of Air Carriers,* in 1934 and Hotchkiss published his *Aviation Law* in 1938, our courts have decided many cases with precedent upon the common law in the field of aviation. Mr. Rhyne is chairman of the American Bar Association's Committee on Aeronautical Law. Formerly he was National Chairman of the Junior Bar Conference and specializes in aviation law in Washington. This is the author's third major work in his specialized field. His reputation, background, and position should certainly satisfy everyone as to the authenticity and accuracy of his work.

Aviation presents a very spectacular source of litigation and appeals to the imagination. Each year thousands of new civilian planes appear, and the casualties of the past are sign posts for the modern lawyer to prepare for the future. Mr. Rhyne has a complete analysis of the reported decisions affecting the liabilities of aircraft operators resulting from accidents. Comprehensive titles make it very easy to find the pertinent language of the decisions to illustrate the positions taken by the courts in this well-conceived volume. This work is recommended as a starting point for any case involving aviation law, but attorneys using the volume should supplement the material presented by a thorough study of all cases in their various jurisdiction. For example, under "Contributory Negligence" on page 145, the general rule is stated, "The contributory negligence of the person injured will bar his recovery. . ." However, in jurisdictions like Mississippi such negligence is not a bar to recovery but only mitigates the damage.

However, few if any of the subjects falling within the comprehensive title arrangement have escaped exhaustive treatment. The general subjects considered include: (1) Types of accidents, (2) Liability of manufacturers, repairmen and vendors, (3) The doctrine of res ipsa loquitur, (4) Proof of cause of aviation accidents, (5) Defenses in aviation cases, (6) Workmen's compensation, and (7) Aviation exclusion clauses.

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*Professor of Law, University of Mississippi, School of Law.

As a summary of the law as it is today *Aviation Accident Law* gives the reader a most excellent overall picture of the subject so that the ever scrupulous attorney, who may desire to read his cases in full text before using them, will have a good foundation and will be able to grasp the entire field.

Appropriately enough Senator McCarran of Nevada, the sponsor of the Civil Aeronautics Act of 1938 and the Federal Airports Act of 1946, has added his endorsement to this work and aptly states in a foreword:

> While many cases must yet be decided to develop aviation accident law to the status of the law applicable to other older modes of transportation, the author has given lawyers an invaluable tool with which to work in developing this field of aviation law.

*Gibson Witherspoon**
*Frank G. Thomas***
Co-Chairmen of Committee on Aviation Law
Mississippi State Bar Association

BACKGROUND OF ADMINISTRATIVE LAW. By Milton M. Carrow; (1948); Associated Lawyers Publishing Company, 35 Court Street, Newark 2, New Jersey; pp. 214; $5.00.

The need of uniformity in a discussion of the basic principles of administrative law has become increasingly apparent since the passage of the Federal Administrative Procedure Act in June, 1946. There is no scarcity of scholarly work on isolated aspects of these principles, but there has been little effort to treat them in a unified manner. This publication does an admirable job of achieving that objective. It gives not only an exhaustive examination of the law involved, but it is easy to read and to understand.

The growth of the administrative process is described; the subject of administrative law is defined; and the essential elements of its confusing terminology are clarified. The doctrine of the separation of powers, which has been the major conceptual stumbling block to the functional analysis of administrative law, is given a thorough discussion. Its application to the limitations upon administrative adjudicative powers and its restriction upon the delegation of rule making powers to administrative agencies are taken up in separate chapters. In another chapter is shown the superficial resemblance between the separation of powers doctrine and the problems of the separation of functions. The pertinent issues of the latter subject are explored and the Federal Administrative Procedure Act is applied to the problems involved. As a conclusion, the author reviews the historical and pragmatic aspects of the doctrine of the "rule of law". He shows how, upon this doctrine, the judiciary has, to a large extent, based its asserted controls over the law-making powers of administrative agencies. In this connection an outline of the problems of judicial review is sketched.

Throughout the book, where the Federal Administrative Procedure Act has sought to resolve the problems raised, reference is made to it. The full text of the Act is set forth in Appendix A. In Appendix B the text of a Model State Administrative Procedure Act recommended by the National Conference of Commissioners on Uniform State Laws is reprinted.

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*Meridian, Mississippi
**Tupelo, Mississippi

The author has a full realization that an authoritative discussion of administrative law cannot be confined to the cases alone. A large part of the materials concerning the subject lie outside the orthodox sources of the law. Reports by different official committees or investigating bodies, reports by bar associations, specialized studies subsidized by interested organizations or individuals, and numerous articles in the law reviews and political science periodicals have all played a major role in shaping the present status of administrative law. Use has been made of these various sources whenever the best interests of the discussion would be served thereby. The entire background of administrative law has been covered; and the legal principles involved in every case cited are thoroughly substantiated.

Administrative law is such a vast field that it is not often that one can obtain a treatise which has been kept down to a practical size and still fulfilled its primary intention. This author has done both. He deserves credit for presenting so much information so clearly in so few pages. *Background of Administrative Law* should prove itself to be not only an aid in understanding the essential problems involved in administrative law, but also an aid in understanding the fundamental principles upon which it is based.

*Frank E. Shanahan, Jr.**

*Attorney-at-law
Vicksburg, Mississippi

BOOK NOTES

Aviation

AIRPORT LEASE AND CONCESSION AGREEMENTS, by Charles S. Rhyne; National Institute of Municipal Law Officers, 730 Jackson Place, N.W., Washington, D. C.; 1948, pp. 206. A study of the sources of municipal airport revenues and court decisions on use, lease and concession agreements, with model forms for airline, fixed-base, and concession uses together with an explanation of each form.

Workmen's Compensation

INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS, by Samuel B. Horovitz; Wright & Potter Printing Co., 32 Derne Street, Boston, Massachusetts; 1944 with reprints in 1946 and 1948; pp. 518; $6.00. In one volume the fundamental principles as interpreted by the courts and compensation experts in all the compensation states, and in other jurisdictions, including the American territories and England. Written so as to be of use by the general public as well as by the bench and bar.

ACKNOWLEDGMENT OF BOOKS RECEIVED

MISSISSIPPI'S WEALTH: A Study of The Public Administration Of Natural Resources, by Robert Baker Highsaw (1947), pp. 190. State Administration Series No. 2, Bureau of Public Administration, University of Mississippi, University, Mississippi.

A HANDBOOK OF MISSISSIPPI STATE AGENCIES (1948), pp. 191. State Administration Series No. 5, Bureau of Public Administration, University of Mississippi, University, Mississippi.

MISSISSIPPI: A GUIDEBOOK OF THE BOARD OF SUPERVISORS, by Huey Blair Howerton (1948), pp. 58. County Government Series No. 1, Bureau of Public Administration, University of Mississippi, University, Mississippi.

MEMORIAL SERVICES—

Memorial services in honor of the members of the Bar who departed this life during the past year were held in the Supreme Court Room on September 13, 1948. The Memorial Resolutions, adopted by the Bar, were read by Honorable Ross Barnett, and are as follows:

MEMORIAL DAY RESOLUTIONS OF THE MISSISSIPPI STATE BAR SEPTEMBER 13, 1948

WHEREAS, another year has passed since the members of our Bar gathered with our Supreme Court to pay tribute to the memories of our deceased brothers, and

WHEREAS, the Grim Reaper in its unrelenting passage has gathered in his fold, outstanding and distinguished members of our profession, when their leadership and noble examples were solely needed to meet the problems of their beloved State and Nation, and

WHEREAS, We, the surviving members of the State Bar sorrowfully assemble to pay tribute to our distinguished deceased brethren and to pay tribute to their memory, and

WHEREAS, the undersigned, constituting a special committee of the Mississippi State Bar to prepare and present resolutions relating to them, first desire to list their names, all of whom have departed this life since the Memorial Exercises of 1947.

These members, all of them outstanding, loyal and trustworthy in the practice of our profession, are the following:

Miss Catherine Bass, Jackson
R. Leon Bass, Belzoni
Z. A. Brantley, Louisville
C. F. Burnaman, Brookhaven
Joe B. Coursey, Hattiesburg
Neil T. Currie, Hattiesburg
R. D. Denman, Greenwood
S. H. Davis (Judge), Indianola
F. W. Elmer, Biloxi
C. E. Gibson, Monticello
Byron J. Goss, Columbia
T. P. Guyton (Judge), Kosciusko
Fleet C. Hathorn, Hattiesburg
D. B. Holmes, Jr., Meridian
Frank Clark Holmes, Sr., Hernando
G. W. Hosey, Laurel
O. C. Luper, Prentiss
James M. Mars, Philadelphia
Hugh Barr Miller, Jackson
A. M. Mitchell, Pontotoc
W. M. Mitchell, Grenada
J. H. O'Neal, Clarksdale
E. C. Patty, Macon
S. D. Redmond, Jackson
Edw. B. Sauls, Jr., Jackson
H. A. Shotts, Meridian
Sydney Smith, (Judge), Jackson
W. P. Stribling, Columbus
Littleton Upshur, Greenwood
W. W. Venable, Clarksdale
B. F. Wasson, Greenville
H. J. Wilson, Hazlehurst
Kit Williams, Memphis, formerly of Yazoo City
T. Webber Wilson, Laurel
P. B. Woollard, Cleveland
V. D. Rowe, (Judge), Winona

They all made full use of the talents God bestowed upon them, and conscientiously and faithfully demeaned themselves with credit and in accordance with the high ethics of our profession and their oaths as attorneys, and it is not only proper but well for us, that we should pause at this hour and gather inspiration from the memory of the services they unstintingly gave as public servants, and to publicly express our regret at their passing and to extend our heartfelt sympathy to the families; NOW THEREFORE

BE IT RESOLVED that the Mississippi State Bar, duly assembled in the Courtroom of the Supreme Court of Mississippi, in the City of Jackson, on this September 13, 1948, join with the loved ones and the friends of our deceased brethren in mourning their death, acknowledging a great loss to our Bar, and to their communities and to the State and Nation, and admonishing those of us who remain to carry on our profession and to conduct ourselves as they did in accordance with the high tradition of our profession.

BE IT FURTHER RESOLVED that we express to the members of the families of our deceased brethren our deep sympathy in their bereavement.

BE IT FURTHER RESOLVED that a copy of these resolutions be entered on the minutes of the Supreme Court and on the minutes of the Mississippi State Bar, and that a copy be transmitted to each of the families of our deceased brethren and a copy to the Press.

Respectfully submitted,
ROSS R. BARNETT
Chairman
WALKER BROACH
THOMAS J. WATKINS
R. M. KELLY
HUGH CLAYTON
W. C. KEADY
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